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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, ET AL., *Appellees*

Appeal Docketed July 22, 1969

Probable Jurisdiction Noted October 27, 1969

No. 382

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, ET AL., *Appellees*

Appeal Docketed July 24, 1969

Probable Jurisdiction Noted October 27, 1969

Docket Entries

Date		Date Order Judgment No.
1968		
Sept. 26	Filed Complaint—issued original Sum. & 4 copies S&C to US Marshal	1
	Filed Motion for Order to stay the going into effect of an Order of the ICC-4 copies to US Marshal	2
	Copy of Complaint to Court	
Sept. 30	Filed Motion of T.I.M.E. Freight, Inc. and Transcon Lines, Inc. to intervene-quad.	3
	Filed Affid. of service of notice of filing of Complaint, in quadruplicate	4
	Filed & Ent. Order permitting intervention of T.I.M.E. Freight, Inc., and Transcon Lines, Inc. (in quadruplicate) Counsel notified by card.	5
Oct. 1	Filed Joint Memorandum of the USA & ICC in opposition to temporary restraining Order. Copy to Court.	6
Oct. 2	Filed Pltfs' Memorandum in support of proposition that no bond is required, and Memo. concerning the question of exhaustion of administrative remedies.	7
Oct. 2	Ent. record hear. Pltfs' Motion for Order staying Order of ICC granted.	
Oct. 2	Filed Affid. of Jerome Biniasz, in quadruplicate	8
	Filed & Ent. Order staying going into effect of Order, in triplicate	9
	Filed Motion of Merchants Fast Motor Lines to intervene, in quadruplicate	10
	Filed & Ent. Order permitting intervention of Merchants Fast Motor Line, in quadruplicate	11

Oct. 4—Filed & Ent. Order designating U.S. Circuit Judge and U.S. Dist. Judges: Hon. Gilbert H. Jertberg, Hon. George H. Boldt., Hon. William N. Goodwin. 12

Oct. 4—Filed Affid. of service of certified copy of Order 13

Oct. 10—Filed Marshal's Ret. on Sum. 14a, b

Oct. 21—Filed Transcript of proceedings of 10/2/68, in triplicate 15a, b, c

Nov. 4—Filed Motion of various Railroad companies to intervene 16

Filed Notice of hearing Motion to intervene on Monday, 11/18/68 at 9:30 a.m. 17

Lodged Complaint to set aside etc: Order of ICC STRICKEN

Nov. 12—Filed Motion of Defts to stay further proceedings herein Copy to Court (quadruplicate) 18

Nov. 14—Filed & Ent. Order permitting intervention of various railroad companies. Counsel notified by card. 19

Nov. 15—Filed Reply to Defts' "Motion to stay further proceedings" in quadruplicate 20

Nov. 14—Filed Complaint to set aside & annul Order of ICC by Intervening Pltfs 21

Nov. 21—Filed Marshal's ret. on Order 22

Nov. 22—Copy of Motion of Defts to stay, etc. forwarded to Judges Jertberg & Goodwin.

Nov. 18—Copy of Reply to Defts' Motion to Judges Jertberg, Boldt & Goodwin

Dec. 27—Filed Motion of Ashworth Transfer, Inc. to intervene 23

Dec. 30—Filed & Ent. Order permitting the intervention of Ashworth Transfer Inc. as Party Plaintiff—Counsel notified by letter 24

Dec. 31—Filed Supplemental Complaint setting forth transactions or occurrences or events which have happened since the date the original complaint was filed herein. Copy to each of Judges Jertberg, Boldt & Goodwin 25

Dec. 31—Filed Motion for Order to Stay the Going into effect of an order of the ICC. Copy to Judges Jertberg, Boldt and Goodwin 26

Dec. 31—Received letter from James Henriot requesting motion to set for hearing *Monday 1/6/69*

1969

Jan. 2—Filed Affid. of service of notice in quadruplicate. Copy to Judges Jertberg, Boldt and Goodwin 27

Jan. 3—Filed Motion of Yellow Freight System, Inc., to intervene. 28

Jan. 6—Filed Joint Memorandum of US & ICC in opposition to temp. restraining Order 29

Jan. 6—Filed Motion of American Farm Lines to Intervene as Deft 30

Filed & Ent. Order Authorizing Intervention of American Farm Lines as Deft 31

Jan. 6—Filed & Ent. Order Permitting Intervention of Yellow Freight System Inc. as Party Plaintiff 32

Filed Motion of Intervenor American Farm Lines to Dismiss Pltfs' Application for Temporary Restraining Order 33

Filed Brief in Support of Intervenor American Farm Lines in support of Motion to Dismiss, with attachments 34

Filed *Answer* of Intervenor American Farm Lines 35

Ent. Record Hearing on Pltfs' Motion for an Order to Stay Going into Effect an Order of the ICC—Motion Granted

Filed & Ent. Order Staying Going into Effect of Order at 3:15 PM 36

Case set for hearing before the 3-Judge Court, 2:00 P.M., January 24, 1969 both to determine whether temporary restraining order should have been entered and to hear the cause on its merits

Filed Memorandum re ICC ruling in similar case involving Riss & Co. See letter of transmittal, 1/6/69, to 3 judges setting forth documents forwarded to them 37

Jan. 10—Filed Motion of Consolidated Copperstate Lines and Tri-state Motor Transit Co. to intervene as party Pltfs. 38

Jan. 13—Filed Pltfs' opening Brief. (2) Copy to Judge Boldt—copies to Judge Jertberg and Judge Goodwin by Mr. Adams. 39

Jan. 14—Filed *Joint Answer* of USA and ICC to initial Complaint filed 9/26/68 and Suppl. 40 Complaint filed 12/31/68.

Jan. 14—Filed & Ent. Order permitting intervention of Consol. Copperstate Lines & Tri-State 41

Jan. 14—Copy of Motion to Intervene. Order permitting intervention and Joint Answer of US & ICC to Judge Boldt, Judge Jertberg and Judge Goodwin

Counsel advised Order entered. (Mr. Adams, Mr. Wigger, Gordon et al)

Jan. 14—Filed Motion of United Transports Inc. to intervene 42

Jan. 15—Filed & Ent. Order permitting intervention of United Transports, Inc. as Pty Pltf. Card to Mr. Henriot, Mr. Wigger, Gordon, et al. 43

Jan. 16—Filed Transcript of proceedings of 1/6/69 in duplicate. Copy to Judge Boldt, Judge Jertberg, Judge Goodwin 44a

Jan. 17—Filed Index to Pltfs' opening Brief (3

Jan. 17—Filed Motion of Braswell Motor Lines, Inc., et al, to intervene as party Pltfs Lodged Order permitting intervention of Braswell Motor Lines 45

Jan. 20—Filed Joint Brief of US & ICC—Copy to each Judge by Mr. Cerra 46

Filed Memorandum Brief—Statement of the Case, of American Farm Lines 47

Jan. 20—Filed & Ent. Order permitting intervention of Braswell Motor Lines, Central Freight Lines, Central Express, Inc., Red Arrow Freight Lines, Inc., Brown Express, Inc., Alamo Express, Inc., J. H. Rose Truck Line, Inc., J. J. Willis Trucking Company, J. V. Harrison Truck Lines, Inc., Miller Truck Line Inc., H. S. Anderson Trucking Co., Central Forwarding, Inc., and Robertson Tank Lines, Inc. 48

Jan. 23—Filed Pltfs' Reply Brief. Copy to each Judge by Mr. Adams 49

Jan. 24—Filed cert. record of proceedings before ICC 50a-i

Jan. 24—Ent. record 3-Judge hearing had. Arguments presented. Matter submitted

Jan. 27—By Direction of Court, all counsel of record notified to serve & file proposed Findings, Conclusions & Order on or before February 14, 1969—(see letter in file) all judges notified

Feb. 13—Lodged proposed Findings of Fact and Conclusions of law in quadruplicate (ICC)

Lodged proposed Judgment in quadruplicate (ICC)

Feb. 14—Lodged Pltfs' proposed Findings of Fact and Conclusions of Law in quadruplicate.

Copy of all proposed Findings & Concl. & Jdmt to each Judge

March 26—Filed & Ent. Opinion-Findings of Fact and Conclusions of Law 51

Filed & Ent. Jdmt: Each of Temporary Authorities issued by ICC to intervening Deft. American Farm Lines on 9/3/68 and 12/19/68 be held and adjudged null and void; Stay Order as to each of sd Temporary Authorities is cont'd in effect until further Order of this Court. Copy to all Counsel (10) 52

May 23—Filed Notice of Appeal by American Farm Lines, intervening Deft. Counsel advised by letter (Copy of Notice to all parties by Appellant) Copy to each Judge. 53

May 26—Filed Notice of Appeal to the Supreme Court by Interstate Commerce commission. Counsel advised by letter (Copy of Notice to all parties by Appellant) Copy to each Judge. 54

June 20—Filed Motion of American Farm Lines for a Stay pending Appeal, in quadruplicate. Copy to each Judge 55

Filed Certificate of service of Motion 56

June 23—Filed Memorandum for ICC supporting Motion of American Farm Lines for Stay, in quadruplicate. Copy to each Judge. 57

June 26—Filed Memorandum to the Court and request to fix date for submission of Memorandum in quadruplicate. Copy to each Judge. (American Farm Lines) 58

June 27—Filed letter from Mr. Kahn to Clerk advising United States has not joined in Appeal 59

June 27—Filed Memo. to Court re date for submission of opposing Memorandum to Intervening Deft's Motion to Stay. 60

June 30—Filed telegraphic message from Mr. Kahn to Judges to clarify letter of 6/25 61

June 30—Record on Appeal forwarded to Clerk, Supreme Court, Wash. D. C. in 2 cartons. #369; 382 61

June 30—Filed & Ent. Order fixing time for Pltfs and intervening Pltfs to file response to Motion of American Farm Lines for stay pending Appeal. Counsel advised by Mr. Henriot at Court's direction. 62

July 2—Filed Certificate of service of Order fixing time, by Mr. Henriot 63

July 3—Doc. #50 (ICC Record of Proceedings) air mailed to Clerk, Supreme Court, Wash. D. C.

July 7—Filed Certificate of service of Memorandum by American Farm Lines 64

July 9—Filed Reply of intervening Rail Carrier Pltfs to Motions for Stay pending Appeal in quadruplicate. Copy to each Judge. 65

July 14—Filed Reply of Pltfs & Pltf. Intervenors to Motion of American Farm Lines for a Stay pending Appeal, in quadruplicate. Copy to Each Judge. 66

July 16—Recd Ltr from counsel for AFL to Judge Boldt advising AFL will not file an Opposing Memorandum (Copy to each Judge)

July 22—Ent. Minute Order denying Motion of Intervening Deft. American Farm Lines for Stay pending Appeal. Copy to all counsel, and each Judge.

July 29—Suppl. Record on Appeal forwarded to Supreme Court, Wash. D. C.

Aug. 21—Filed & Ent. Order denying Motion of American Farm Lines for a Stay pending Appeal. Conformed copy to each Judge. Counsel notified. 67

Aug. 28—Filed copy of letter from Mr. Davis, Clerk, Supreme Court, to Mr. Califano, Jr. advising that Order granting Stay was granted 8/21/69 by Mr. Justice Douglas. 68

Nov. 3—Filed copies of notice advising one hour allotted for oral argument, ICC & American Farm Lines 69a, b

Notice of filing of the documents described below was published in the Federal Register of 5/28/68.

7

No. MC 129908 TA filed May 17, 1968

Applicant: AMERICAN FARM LINES, 641 North Meridian, Oklahoma City, Okla. 73107

Applicant's representative: WESLEY L. JOHNSON, (same address as above)

Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *General commodities including classes A and B explosives*, restricted to traffic moving on Government Bill of Lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and on the other, points in Washington, California, Nevada and Arizona, for 180 days. SUPPORTING SHIPPER: Department of the Army, Office of Judge Advocate General, Washington, D. C., 20310. SEND PROTESTS TO: C. L. Phillips, District Supervisor, Interstate Commerce Commission, Bureau of Operations, Rm. 350 Amer. Gen. Bldg., 210 N.W. Sixth, Oklahoma City, Okla. 74102.

Notice of filing of the documents described below was published in the Federal Register of June 8, 1968.

9-A

No. MC 129908 TA (CORRECTION), filed May 17, 1968, published Federal Register, issue of May 28, 1968, and republished as corrected this issue.

Applicant: AMERICAN FARM LINES, 641 North Meridian, Oklahoma City, Okla. 73107

Applicant's representative: WESLEY L. JOHNSON, (same address as above)

Authority sought to operate as a *common carrier*, by motor vehicle, over irregular routes, transporting: *General*

commodities including classes A and B explosives, restricted to traffic moving on Government Bills of Lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Utah, and Arizona, for 180 days. NOTE: The purpose of this republication is to add the State of Utah to the States proposed to be served, inadvertently omitted from previous publication. SUPPORTING SHIPPER: Department of the Army, Office of Judge Advocate General, Washington, D. C. 20310. SEND PROTESTS TO: C. E. Phillips, District Supervisor, Interstate Commerce Commission, Bureau of Operations, Rm. 350 Amer. Gen. Bldg., 210 N.W. Sixth, Oklahoma City, Okla. 73102.

Headquarters
Department of The Army
Office of The Judge Advocate General
Washington, D. C. 20310

30 April 1968

Mr. Howard McCormack
General Manager
American Farm Lines Co-op
Oklahoma City, OK 73107

Re: Application of American Farm Lines, Inc., to Transport General Commodities Including Class A and B Explosives

Dear Mr. McCormack:

As duly authorized counsel for the Secretary of the Army and the Department of Defense, I have been asked to reply to your request for the Department of Defense support in connection with your application before the Interstate Commerce Commission to transport general commodities, including Class A and B explosives.

The Department of Defense has used the services of American Farm Lines, Inc., to transport more than 1,200 shipments since December 1966. Your service has been excellent in every respect. In fact, the Department of Defense has found American Farm Lines' service to be fast, efficient, responsive, and economical. Under the circumstances, the Department of Defense is desirous of being able to continue to use the services of American Farm Lines. In many instances the Department of Defense receives direct through service from American Farm Lines, Inc. which is desirable. In other words, the Department of Defense would like to retain this transportation source which has been available to it. However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines.

Should an oral hearing be held on your application, the Department of Defense will present an authorized and qualified witness to testify to the above facts.

Sincerely yours,

CURTIS L. WAGNER, JR.
Chief, Regulatory Law Division

Mr. Wagner/svm 30/ Apr 68

DEPARTMENT OF THE ARMY
Headquarters
Military Traffic Management and Terminal Service
Washington, D. C. 20315

10 May 1969

Mr. Bill D. Gardner
Riss & Company, Inc.
903 Grand Avenue
Kansas City, Missouri 64106

Dear Mr. Gardner:

This is in reply to your letter of 30 April 1968 concerning American Farm Lines proposed application to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity.

The position of the Department of Defense (DoD) in this matter is outlined for your information. The Department of Defense has utilized the transportation services of farm cooperatives in the movement of military traffic since the latter part of 1966, and such services have been satisfactory, fast, and economical. Consequently, the DoD would like to retain this transportation source. However, the DoD is not in a position to state that there would be insufficient or inadequate service without American Farm Lines.

The American Farm Lines was advised of the above position in a letter from the Office of The Judge Advocate General, Department of the Army, dated 30 April 1968.

It is hoped that this will clarify any misunderstandings which may exist with respect to the DoD's position in this matter.

Sincerely yours,

WOODROW W. ATKINS
Colonel, JAGC
Staff Judge Advocate

[SEAL]

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C. 20310

U 672 15 May 1968
JAGU 1968/9695

Temporary Authority Board
Interstate Commerce Commission
Washington, D. C. 20423

Re: American Farm Lines Application for 180 Days Temporary Authority Over Irregular Routes (General Commodities and Class A and Class B Explosives)

Gentlemen:

As duly authorized counsel for the Secretary of the Army and the Department of Defense, I wish to call the Commission's attention to the following facts in connection with the above-entitled application and the desirability of the immediate issuance of temporary authority to American Farm Lines for the transportation of general commodities and Class A and Class B explosives from areas in the Middle West to the west coast and in reverse direction.

The Department of Defense is constantly looking for ways to "shorten the pipeline" of its vital military supplies. This is effected through reduced transit times between points of manufacture and warehouses, and warehouses and points of export. A speedup in transit time will bring about a greatly improved logistics effectiveness resulting in reduced cost to the Government.

The Department of Defense has used the services of American Farm Lines to transport more than 1200 shipments (Government Bills of Lading) since December 1966. Its services to the Department of Defense have been excellent in every respect. The services of this company have afforded the Department of Defense a meaningful measure, under practical conditions, of carrier capability in general. Its shorter service is necessary as both a measure and a participant in "shortening the pipeline." A

sound adequate transportation system is essential to the national defense. Accordingly, the military establishment supports as many diverse carriers and routes as can be supported by the economy.

Services rendered to the Department of Defense by American Farm Lines have been provided pursuant to an "exemption" from economic regulation. However, recent court actions have resulted in interpretations of that exemption which will severely limit American Farm Lines' ability to continue to provide the service to the Department of Defense that it is currently receiving and which the Department of Defense considers desirable and necessary. Under the circumstances, if the Department of Defense is to continue to receive this extremely desirable service, an immediate grant of temporary authority is necessary. For example, since the United States District Court for the Western District of Oklahoma issued its decision on 20 February 1968, enjoining American Farm Lines from performing back to back transportation service for the Department of Defense, American Farm Lines has been required to turn down more than 700 truckloads of Department of Defense traffic. Prior to the injunction, American Farm Lines moved approximately 300 truckloads of Department of Defense freight per month. Accordingly, the Department of Defense urges the Interstate Commerce Commission to grant the temporary authority sought by American Farm Lines to assure the continued availability of its service. The Department of Defense will also support the desirability of the issuance of comparable permanent authority to American Farm Lines.

This office will be pleased to furnish any additional information that you may desire.

Sincerely yours,

/s/ Curtis L. Wagner, Jr.
Curtis L. Wagner, Jr.
Chief, Regulatory Law
Division

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET No. MC-129908 TA

AMERICAN FARM LINES

Protest of American Trucking Associations, Inc.

Comes now American Trucking Associations, Inc. (ATA), and protests the above-captioned application and specifically requests the Commission, upon consideration of the merits, to deny the application for the following reasons:

I

Protestant's Interest

ATA is the national organization of the trucking industry, representing all types of motor carriers of property, on whose behalf it customarily appears in proceedings before the Commission and the courts. It is a non-profit organization organized and existing under the laws of the District of Columbia, with offices at 1616 P Street, N.W., Washington, D. C. 20036.

II

Shipper's Supporting Letter Fails To Demonstrate An "Immediate And Urgent Need" For The Authority Sought

Section 210(a) of the Act (49 U.S.C. § 310a(a)), provides that:

> To enable the provision of service for which there is *an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need*, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a com-

mon carrier or a contract carrier by motor vehicle, as the case may be. (Emphasis supplied)

Therefore, as a condition precedent to the granting of an application for temporary authority, applicant has the burden of establishing through supporting statements that there is an "immediate and urgent need for service which cannot be met by existing carriers." (49 C.F.R. § 1131.2(c)) Once this showing has been made the Commission, within its discretion and without hearing or other proceedings, may grant the temporary authority sought.

In order to aid the Commission in ascertaining whether the supporting statement establishes a "need" for temporary authority, guidelines have been set forth in 49 C.F.R. § 1131.2(c). This regulation provides as follows:

Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known. (Emphasis supplied)

The clear meaning of the above-quoted language is that it sets forth the minimal showing which *must* be made in order to establish an "immediate and urgent need for service which cannot be met by existing carriers." (49 C.F.R. § 1131.2(c)) Also, it is readily apparent that these minimal requirements are mandatory, especially when considered in light of the fact that the Commission's grant of temporary authority is discretionary, and hearings or other proceedings are not required.

In applying the requirements of section 1131.2(c) to the letter of support in this proceeding, we submit that the statement is fatally defective in a number of vital respects, and, therefore, applicant has failed to sustain its burden of proof.

The Department of Defense, in its letter dated May 15, 1968, fails to specify (1) a broad need setting forth a representative number of points which would justify the sought grant of radial authority involving a 13 State area; (2) how the involved traffic is transported now; (3) whether there is any urgency as to the time within which this service must be provided, and the reasons therefor; (4) any ill consequences which will result if the service sought is not made available to it; (5) any indicia of circumstances tending to establish that there is an immediate and urgent need for the requested service; (6) whether the supporting shipper has made any efforts whatsoever to obtain the needed service from existing carriers; and (7) whether any existing carriers either failed or refused to provide the service, or the reasons given for any such failure or refusal.

The Department of Defense predicates its support of the service sought upon the following grounds: (1) the constant search for carriers offering expedited transit time which will enable the Department of Defense to "shorten the pipeline" of its vital military supplies; and (2) recent court actions [1] which concluded that the transportation of the commodities involved herein by American Farm Line constitutes common carriage and is not exempt under Section 203(b)(5) of the Act (49 U.S.C. § 303(b)(5)), and en-

---

[1] In *Munitions Carriers Conference, Inc., et al.* v. *American Farm Lines, et al.*, Civil No. 67-487, D.C.W.D. Okla., Feb. 20, 1968, the court found that transportation of the traffic involved herein by American Farm Lines constituted "common carriage by motor vehicle" as defined in Section 203(a)(14) of the Act (49 U.S.C. § 303(a)(14)), and is not exempt under Section 203(b)(5) of the Act (49 U.S.C. § 303(b)(5)). Therefore, the court enjoined this round-trip (back-to-back) service because it was found to be in violation of Sections 203(c) (49 U.S.C. § 303(c)) and 206(a) (49 U.S.C. § 306(a)) of the Act.

Also, in *Munitions Carriers Conference, Inc., et al.* v. *American Farm Lines, et al.*, Civil No. 68-148, D.C.W.D. Okla., May 28, 1968, American Farm Lines was enjoined from providing the above-described service except as a leg of a round trip, the other leg of which constitutes transportation performed pursuant to the provisions of the Agricultural Marketing Act.

joined applicant from moving such traffic in round trip (back-to-back) movements. Therefore, the Department of Defense states that American Farm Lines' expeditious and satisfactory service is no longer available to it.

The regulation in 49 C.F.R. § 1131.4(b)(2) clearly sets forth the standard to be applied in determining the existence of an "immediate and urgent need" as follows:

> An immediate and urgent need justifying a grant to temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed.

In light of the above-quoted language, we submit that neither the supporting shipper's constant quest to "shorten the pipeline" (whatever that ambiguous phrase may mean) of its vital military supplies nor the fact that American Farm Lines, due to its illegal transportation of these commodities, was enjoined from performing such service establish an "immediate transportation need;" especially in the absence of a showing that existing services cannot meet these "needs." It is significant to note that although the shipper states that due to the injunction American Farm Lines has had to turn down over 700 truckloads of traffic, and that prior to the injunction American Farm Lines moved about 300 truckloads a month of shipper's traffic, shipper nowhere alleges within the four corners of its statement that it was unable to obtain service from existing

carriers for those loads which American Farm Lines could no longer move, that the services of existing carriers are not reasonably satisfactory, or that existing carriers are not authorized to serve all the points involved. The most that the statement tends to establish is that the supporting shipper has used American Farm Lines' illegally performed service in the past and desires to give its blessing to that organization's efforts to legitimatize its siphoning off, for the future, the traffic of existing carriers. This, at best, amounts to little more than a mere preference [2] for American Farm Lines' service.

We submit that the letter in support of this application does not meet the minimum requirements of a supporting statement as set forth in 49 C.F.R. § 1131.2(c) and, concomitantly, does not offer one scintilla of evidence tending to establish that there exists an "immediate and urgent need for service which cannot be met by existing carriers." Inasmuch as applicant has failed to sustain its statutory burden, and for the reasons previously discussed, the application should be denied.

Conclusion and Prayer

In an application seeking temporary authority, applicant has the statutory burden of proving an "immediate and

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[2] The Department of Defense has prescribed specific standards for participation by representatives of the military services or agencies in proceedings befor transportation regulatory bodies. As pertinent hereto, Change 20, Chapter 105, 4 April 1968, Military Traffic Management Regulation (AR 55-355) provides as follows:

> Evidence and participation in such proceedings will be in accordance with the military needs or such other information as may be requested by the regulatory or supervisory body (consistent with security regulations) and, in the event new or additional operating authority is involved, *will not indicate a preference for any carrier. Such participation will be in support of the needs of the department for service as distinguished from support of a particular carrier. Applications for operating rights will not be supported when the effect is simply to provide additional service; or to provide a large number of participating carriers;* or to provide single-line service when adequate interline service exists; or to provide lower rates. (Emphasis supplied)

urgent need for service which cannot be met by existing carriers." That burden is not met where, as here, the letter in support of the application fails to set forth even the minimum information required by the Commission in order to enable it to ascertain whether there is an "immediate and urgent need" for the proposed service. Applicant has totally failed to justify the extremely broad grant of authority sought in this proceeding, and completely ignored the availability of the service of existing carriers and their ability to meet whatever need, if any, might exist. In light of the insufficiency of the evidence submitted on behalf of applicant to demonstrate any immediate and urgent need for the proposed service, the application should be denied.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.

PETER T. BEARDSLEY
RICHARD A. MEHLEY
NELSON J. COONEY
JOHN R. BAGILEO
Attorneys

Protest of Ashworth Transfer, Inc.

Ashworth Transfer, Inc., hereinafter called "Ashworth" and Hawkes Transportation Company, Inc., hereinafter called "Hawkes", a wholly owned subsidiary of Ashworth, herewith file their joint protest to the application designated above, avering as follows:

1. Applicant seeks temporary authority to transport General Commodities including Class A and B explosives, restricted to traffic moving on Government Bills of Lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the

one hand, and, on the other, points in Washington, California, Nevada and Arizona.

2. The sole supporting shipper is the Department of Army. The statement filed on its behalf in support of this application wholly fails to comply with the regulations of the Commission and is entitled to no weight whatsoever. (See ex parte 67, 98 M.C.C. 483). The first defect is that the statement contains no "certification of its accuracy" as required by the Commission Regulations. Second, the statement is deficient in that it fails to state any attempt to find alternate transportation and it fails to show *any* deficiency of any kind in presently authorized and available service. Indeed, the reasonable inference to be drawn from the statement is that presently authorized service is available and adequate. The statement avers that since applicant was enjoined from handling certain products for the supporting shipper, it had turned down 700 loads. These loads presumably were transported by presently authorized carriers and no complaint of any kind is made with respect to such movements.

A further deficiency in the statement is its complete failure to delineate the types and volume of the various commodities involved. Aside from the specific reference to Class A and B explosives, the statement shotguns the entire transportation arena without so much as a reference to a single commodity which may be involved. The issuance of such a broad and blanket authority on a temporary basis is not consistent with the National Transportation policy.

In short, the supporting statement is wholly deficient as a matter of law and could not support a grant of authority, even if unopposed by protecting carriers. As is generally discussed in *Motor Carrier Regulations*, Sec. 1131.4(B)(2), the supporting statement must show "an immediate transportation need which reasonably cannot be met by existing

carrier service". No such showing is made, or even attempted, in the supporting statement here involved.

3. The operating authorities of the protestants are attached hereto as Appendix 1 (Ashworth) and Appendix 2 (Hawkes). Pursuant thereto, these protestants are now transporting tremendous volumes of Class A and B explosives between the points here involved in interline service with other duly authorized carriers. Where destination is a point in Nevada or Arizona, Ashworth is the originating or delivering carrier. In other moves, Ashworth acts as a bridge carrier. Hawkes acts as both delivery and originating carrier and bridge carrier on Washington moves, depending upon the specific origin or destination point in Washington. All of such moves go from origin to destination on the same trailer. Neither Ashworth nor Hawkes have received complaints from the supporting shipper with respect to the interline nature of such moves. Indeed, they have received no complaints of any kind with respect to these moves that have not been resolved to the mutual satisfaction of the parties.

Interline carriers for these moves of Class A and B explosives are:

Riss & Co., Inc.
Consolidated Freightways, Inc.
Pacific Intermountain Express
Tri-State Motor Transit Co.
Illinois California Express, Inc.
Ringsby Truck Lines, Inc.
Watson Wilson Transportation System
DeTar Distributing Co., Inc.
T.I.M.E. Freight, Inc.
Navajo Freight Lines
H. J. Gefferies Truck Lines
Baggett Transportation Co.

The movement of such A and B explosives is extremely important to these protestants. It is also extremely competitive at the present time. They desire to increase the amount of such traffic in which they participate. A diversion of the traffic now being handled by them would have substantial adverse effects upon each of them. They are ready, willing and able to continue to transport Class A and B explosives between the points involved in this application.

4. In addition to the Class A and B explosives authority of these protestants, they have substantial authority involving many other commodities which are embraced by this extremely broad and sweeping application. Illustrative is the "size and weight" authority of both carriers and the "contractors' equipment and supplies" authority of Ashworth. Both carriers are actively engaged in furnishing all of the services embraced by their operating authorities. When origin or destination is beyond the territory of these two carriers, moves are made in interline service, consistent with the rules and regulations of the Commission, with other duly authorized carriers. When the customer so requests, such moves go from origin to destination in the same equipment and with the same driver.

Both protestants are willing and able to continue to serve the supporting shipper and the shipping public in the transporting of these commodities. Neither is able to fully utilize its present equipment or facilities. They have terminal facilities at Salt Lake City, Utah, and Denver, Colorado, and station equiment in Washington, Nevada and Arizona. They are ready and willing to station equipment at any other point desired by the shipping public. They need and desire additional traffic. Diversion of existing traffic would create very serious problems for each of them.

5. The statement of the supporting shipper refers to an injunction entered against the applicant to prevent further unlawful hauling by applicant by the United States District Court for the Western District of Oklahoma on February 20, 1968. A further injunction was entered against the applicant by the same Court on Monday, May 20, 1968.

We submit that the arrogant and callous disregard by the applicant of prevailing law and of the rules and regulations of the Commission which required the injunctive relief granted by the Oklahoma District Court demonstrates that the applicant is not a fit carrier to be granted operating authority. A grant of authority to such a carrier, if at all, should be made only after full and complete hearing at which these protestants would have an opportunity to cross-examine applicant's operating witnesses and offer evidence in opposition to the grant of authority.

Protestants respectfully submit that the application here involved should be denied for the following reasons:

1. Applicant has failed to show that the proposed service is required by the public convenience and necessity.

2. Applicant has failed to show any urgent or immediate need, or indeed any need of any kind, for the proposed service.

3. The supporting statement, as a matter of law, is insufficient to justify a grant of temporary authority.

4. Applicant has demonstrated its lack of fitness as a common carrier by its callous disregard of the law and of the rules and regulations of the Commission which has necessitated Federal Court injunction.

5. There are presently available authorized carriers, including these protestants, that can and will transport the commodities here involved between the points and places

here involved. Such services have not been shown to be unsatisfactory or deficient in any particular.

Respectfully submitted,

KEITH E. TAYLOR
Keith E. Taylor, Esq.
of and for
PARSONS, BEHLE, EVANS & LATIMER
520 Kearns Building
Salt Lake City, Utah 84101
Attorneys for Protestants

Protest of Bellm Freight Lines, Inc.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC 129908 TA

In the Matter of:

AMERICAN FARM LINES, 641 North Meridian, Oklahoma City, Oklahoma

Comes now Bellm Freight Lines, Inc., Bonifield Bros. Truck Lines, Inc., Buske Lines, Inc., Centralia Cartage Company, Hyman Motor Service Company, Lee Loyd & Sons Truck Co., Inc., Lovelace Truck Service, Inc., McBride's Express, Inc., H. R. Rinker Transfer and Storage Co., Ulrich Freight Line, J. W. Ward Transfer, Inc., and Western Trucking Company and respectfully submit this their protest to the subject application which appeared in the Federal Register of May 28, 1968 at Page 7796 therein.

Protestants' interest in this matter is in the transportation of general commodities moving on Government Bills of Lading between those points in Illinois, Indiana, Ken-

tucky they are authorized to serve on the one hand, and, on the other, points in the States of Washington, California, Nevada, and Arizona joint-line in connection with T.I.M.E. Freight, Inc., Pacific Intermountain Express, and United-Buckingham Freight System, Inc. over the St. Louis, Mo. and Chicago, Illinois gateways. Protestants are all common carriers of general commodities as attested to by copies of their certificates attached and provide such service daily from and to all of their authorized points. They consider all portions of the certificates attached permitting the transportation of general commodities to be in conflict with the instant application. Collectively protestants operate well over 1200 pieces of road equipment and maintain some 50 terminals and call station through their authorized areas. They maintain through routes and joint rates as well as trailer interchange with the connecting carriers named above.

Protestants interchange or interline daily with T.I.M.E., P.I.E., and United Buckingham and to the best of their knowledge such service has been satisfactory. They contend that they have the equipment and facilities available to handle any and all traffic tendered to them including government shipments, therefore, the granting of the instant application would bar them from further participation in such traffic. They state further that to their knowledge there has not been sufficient movement of general commodity traffic on Government Bills of Lading to sustain the operations of existing carriers in their areas much less an additional one. They have in the past when called upon to do so, transported government traffic under joint tenders with their connections.

Protestants contend that an emergency does not exist and that if there were one they stand fit, willing, and able to meet the needs of their government on immediate notice, therefore, the instant application should be denied until such time as a proper hearing can be held permitting them

to bring forth evidence of their operations and ability to provide the service required.

Dated at *St. Louis, Mo.* this *9th* day of *June* 1968.

BELLM FREIGHT LINES, INC.
BONIFIELD BROS. TRUCK LINES, INC.
BUSKE LINES, INC.
CENTRALIA CARTAGE COMPANY
HYMAN MOTOR SERVICE COMPANY
LEE LOYD & SONS TRUCK CO., INC.
LOVELACE TRUCK SERVICE, INC.
MCBRIDE'S EXPRESS, INC.
H. R. RINKER TRANSFER & STGE. CO.
ULRICH FREIGHT LINE
J. W. WARD TRANSFER, INC.
WESTERN TRUCKING COMPANY

ADAMS, MCLAUGHLIN & SIMPSON

Attorneys at Law
Pacific Building
Portland, Oregon 97204

June 20, 1968

William B. Adams
John G. McLaughlin
Robert G. Simpson

Telephone: 227-2615

Mr. C. L. Phillips,
District Supervisor
Interstate Commerce Commission
Bureau of Operations
Room 350, American General Bldg.
210 Northwest Sixth
Oklahoma City, Oklahoma 73102

Dear Mr. Phillips:

Re: MC-129908, American Farm Lines

In enclose herewith the original and six copies of the protest of Black Ball Freight Service, Pier 30, Seattle, Washington 98134, to the above application.

1. *Description of Authority to Perform Service:*

Protestant has authority to transport in Docket MC-7325 and Subs 3, 5, 6, 8 and 9 wherein and whereby it is authorized to transport general commodities including Class A & B explosives in an area embracing Clallam, Jefferson, Kitsap and Mason Counties, Washington and Seattle and Tacoma, Washington.

2. *Interest in the Application:*

Applicant is protesting this application because it derives in excess of 24 percent of its total revenue from the interlining of traffic moving between the points covered by the application to the extent that

it interlines at Seattle and Tacoma traffic moving between its area and the States named in the application.

Protestant, for example, interlined at Tacoma or Seattle in excess of 52,000,000 pounds of Class A & B explosives during the past year, moving from the Midwest States named in the application to Bangor, Washington. This was all traffic moving on Government Bills of Lading.

Protestant is dependent upon this traffic to survive. Its operating ratio was 94.8 for the calendar year 1967.

Applicant has been handling this explosives traffic for more than 25 years in interline service in through trailers primarily with Garrett Freightlines, Inc., Consolidated Freightways Corporation of Delaware and Pacific Intermountain Express Co.

3. *Equipment and Ability to Perform the Service:*

This protestant, as indicated, has been satisfactorily performing service to points in its service area (including the transportation of explosives) for many years.

4. *Shipper Request:*

Protestant transports traffic for the account of Department of the Army daily. Protestant knows of no refusal or failure of service.

5. *Analysis of Shipper Support:*

An examination of the shipper's supporting letter discloses it does not point out a specific instance of the failure of any service on the part of this protestant or of any other carrier.

Ex Parte 67, 98 M.C.C. 483, reads in part as follows:

"(c) *Supporting statements.*—Each application for temporary authority must be accompanied by a sup-

porting statement (s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved.)

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested).

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reason given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known."

The shippers' letters are notably deficient in not complying with (3), (5), (6), (8) and (9). Attention is invited to the effect that the omissions are a part of the minimum statutory requirements.

It is submitted that the Commission should summarily reject the application for non-compliance with its own rules and regulations.

The shippers' failure to comply with the specific rules severely handicap this protestant in demonstrating that the shippers have in all respects been adequately served, which is a fact.

The rules prescribed in Ex Parte 67 are procedural rules. The Courts have universally and consistently ruled that procedural rules are binding upon the parties to which they apply and also upon the administrators who issue them. *Service* v. *Dulles*, 354 U.S. 363, 472. 388-389; *Arcardi* v. *Shaughnessy*, 347 U.S. 260, 265; *Bridges* v.

Wixon, 326 U.S. 135, 163; and *Coleman* v. *Brucker*, 257 Fed. 2d. 661, where at page 662 it was held:

> "* * * And in *Service* v. *Dulles*, 1957, 354 U.S. 363, 372 77 S. Ct. 1152, 1157, 1 L. Ed. 2d. 1403, the Court sustained Service's contention 'that the Secretary's action is subject to attack under the principles established by this Court's decision in United States ex rel *Accardi* v. *Shaughnessy*, 347 U.S. 260 (74 S. Ct. 499, 98 L. Ed. 681), namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that *this principle holds even when the administrative action under review is discretionary in nature.*'" (Emphasis supplied)

Likewise, in *Atwood's Transport Lines, Inc.* v. *U. S.*, 211 Fed. Supp. 168, affirmed per curiam, 373 U.S. 377, it was stated that:

> "Rules and regulations promulgated by Governmental establishments pursuant to statutory authority have the force and effect of law, and concededly are subject to same tests as statutes. * * *"

6. *The Extremely Broad Scope of the Application:*

The application is extremely broad in scope. It covers the movement of commodities between thousands of points. Accordingly, the application is extremely vague as to an urgent and immediate need for any additional transportation services.

GENERALLY

We wish to stress that the applicant has utterly failed to comply with the requirements necessary to establish an immediate and urgent need for its proposed services and to meet its necessary burden of proof.

The grant of the Temporary Authority would be clearly at variance with the policy of the Commission announced on January 23, 1968, which reads:

"INTERSTATE COMMERCE COMMISSION
Washington, D. C. 20423

737-9765 Ext. 350
15-68

FOR RELEASE:

Tuesday, January 23, 1968
9:30 a.m.

"POLICY CLARIFIED FOR ICC ACTION ON APPLICATIONS FOR TEMPORARY AUTHORITY TO CONDUCT MOTOR CARRIER OPERATIONS

Requests for temporary authority to conduct regulated motor carrier service will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules.

The clarified policy will be administered by Division 1, which handles operating rights matters.

The Commission adopted this policy upon receiving recommendation from the division because of the haphazard preparation of many of the more than 5,000 applications for temporary authority received annually. Most of the requests involve common carrier trucking. The applications usually result from an emergency or short term need of shippers or when new products and commodities are developed and require immediate transportation services.

Because of 'slipshod' preparation of many of the applications, the division frequently has found it difficult to reach an informed and equitable decision. Further investigation by the ICC staff often has been required in order to obtain necessary information. Foremost among the com-

plaints in this area are those concerning failure of the applicant or his representative to submit supporting statements which contain all of the information required by Section 240.2(e) of the Temporary Authority Rules. These rules are set forth in Ex Parte No. MC-67, Motor Carrier Temporary Authorities, 98 M.C.C. 483, and 49 C.F.R. 1131 (formerly 49 C.F.R. 340).

According to the clarified policy, Division 1 will deny temporary authority applications in which, because of noncompliance with the rules, a fair adjudication is not possible on the record before the Commission, without prejudice, however, to the filing of a new application conforming to the rules."

WHEREFORE, it is prayed that the application be denied.

Dated this 20th day of June, 1968.

Respectfully submitted,

WILLIAM B. ADAMS
624 Pacific Building
Portland, Oregon 97204
Attorney for above-named Protestant.

WBA/sr
Enc.

C & H Transportation

Terminal Points of Protestant:

Attached hereto as Appendix 3 is a list showing the location of the general dispatch offices of this protestant and its affiliate and the location of its terminals which are maintained to solicit and provide traffic under its and its affiliate's existing authority. Twenty-three of such terminals are located in the area proposed to be served by applicant (including one terminal in Utah, if the application be amended to include that State).

Basis of Protest of C & H:

Protestant C & H has invested millions of dollars to obtain the motor carrier rights and equipment which it utilizes in providing its authorized service to the shipping public, including the supporting shipper, the Department of Defense. Approximately 10% of protestant's gross revenue is derived from shipments being transported for the Department of Defense. Prior to institution of service by applicant, in excess of its lawfully exempted transportation, this protestant derived a greater percentage of its revenue from government shipments.

The instant application is a patent attempt by applicant to obtain authority from the Commission to enable it to continue performing service which it has heretofore been performing unlawfully.

One department of the government should not be utilized as an agency to obtain appropriate authority from another department of the government to continue performing operations commenced unlawfully.

In a letter to American Farm Lines, dated April 30, 1968, the Office of the Judge Advocate General, Headquarters, Department of the Army, stated:

> "The Department of Defense has used the services of American Farm Lines, Inc., to transport more than

1,200 shipments since December, 1966. Your service has been excellent in every respect. In fact, the Department of Defense has found American Farm Lines' service to be fast, efficient, responsive, and economical. Under the circumstances, the Department of Defense is desirous of being able to continue to use the services of American Farm Lines. In many instances the Department of Defense receives direct through service from American Farm Lines, Inc. which is desirable. In other words, the Department of Defense would like to retain this transportation source which has been available to it. However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines.

"Should an oral hearing be held on your application, the Department of Defense will present an authorized and qualified witness to testify to the above facts."

That letter was not used to support the instant application. However, the May 15, 1968 letter which was used to support the application does not state that the service which it is presently receiving is inadequate and that an emergency need for additional transportation exists.

The May 15, 1968 letter of support indicates that the Department of Defense continues to tender traffic to American Farm Lines, of which "American Farm Lines has been required to turn down more than 700 loads". The support letter does not so indicate, however it is to be presumed or inferred that existing carriers were tendered and did transport those 700 loads.

In any event, there is no emergency which requires that temporary authority be issued to an additional carrier.

Moreover, C & H and its affiliate have the authority, equipment, facilities, to handle a great deal more traffic than has been tendered to it by the Department of Defense.

It would be far more in keeping with the National Transporation Policy for the involved transportation service to be performed by carriers who have invested large sums of money in obtaining authority, providing equipment, and complying with regulations of the Commission in their present operations, than to grant new authority to an organization strongly suspected of having conducted unlawful operations under the guise that the shipments were being transported by an agricultural co-op for its members, or as back haul to transportation being performed for its members.

WHEREFORE, it is submitted that the instant application should be denied in its entirety.

Respectfully submitted,

C & H TRANSPORTATION CO., INC.

By_____

W. T. BRUNSON

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC 129908 TA

Fed. Reg. Date: May 28, 1968

Page: 7796

Date of Protest: June 11, 1968

AMERICAN FARM LINES, 641 North Meridian,
Oklahoma City, Oklahoma 73107

APPLICANT'S REPRESENTATIVE:

Wesley L. Johnson, 641 North Meridian,
Oklahoma City, Oklahoma 73107

Joint Protest of Central Freight Lines Inc., Central Express Inc., Red Arrow Freight Lines, Inc., Brown Express, Inc., Alamo Express, Inc., J. H. Rose Truck Line, Inc., J. J. Willis Trucking Company, J. V. Harrison Truck Lines, Inc., H. S. Anderson Trucking Company, Miller Truck Line, Inc., Central Forwarding Inc. and Robertson Tank Lines, Inc. To Request for Temporary Authority

To: C. L. Phillips, District Supervisor
Interstate Commerce Commission
Bureau of Operations
Room 350, American General Building
210 Northwest Sixth
Oklahoma City, Oklahoma 73102

Now come Central Freight Lines Inc. and Central Express Inc., 303 South 12th Street, Waco, Texas, Red Arrow Freight Lines, Inc., 3901 Seguin Road, San Antonio, Texas, Alamo Express, Inc., 51 Essex Street, San Antonio, Texas, Brown Express, Inc., 434 South Main Avenue, San Antonio, Texas, J. H. Rose Truck Line, Inc., P. O. Box 16190, Houston, Texas, J. J. Willis Trucking Company, P. O. Box 2112, Odessa, Texas, J. V. Harrison Truck Lines, Inc., P. O. Box 15057, Houston, Texas, H. S. Anderson Trucking Company, P. O. Box 3656, Port Arthur, Texas, Miller Truck Line, Inc., 901 Northwest 28th Street, Fort Worth,

Texas, Central Forwarding Inc., P. O. Box 1519, Waco, Texas, and Robertson Tank Lines, Inc.. P. O. Box 1505, Houston, Texas, and submit this joint protest to the granting of the captioned temporary authority application, and would respectfully show:

Applicant seeks to operate as a common carrier, by motor vehicle, over irregular routes, transporting general commodities including Classes A and B explosives, restricted to traffic moving on Government Bills of Lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, and Arizona (four state area), for 180 days. The authority sought by applicant would conflict with existing operations now being performed by protestants pursuant to authority granted to them by the Interstate Commerce Commission, as follows:

Regular Route Protestants

Protestants Central Freight, Central Express, Brown, Red Arrow and Alamo are common carriers by motor vehicle engaged in the transportation of general commodities over regular routes wholly within the State of Texas.

Protestant Central Freight Lines Inc. operates in interstate commerce pursuant to authority issued in Docket No. MC-30867 and subs thereunder. Protestant Central Express Inc. is a wholly-owned subsidiary of Central Freight Lines Inc. and operates in interstate commerce pursuant to authority issued in Docket No. MC-4943 and subs thereunder. The Central System employs approximately 1700 full-time experienced employees and owns and operates over 1560 units of equipment, including trailers of various types, road and city tractors, and similar equipment customarily operated by regular route, general commodity carriers. Approximately 80 terminal facilities are maintained at various points over its system of routes.

Protestant Red Arrow Freight Lines, Inc., operates in interstate commerce pursuant to authority issued in Docket No. MC-2226 and subs thereunder. Red Arrow employs approximately 500 full-time experienced employees and owns and operates approximately 540 units of equipment, including trailers of various types, road and city tractors, and similar equipment customarily operated by regular route, general commodity carriers. Major terminals are maintained at 22 points and local terminals at 29 points on its system of routes.

Protestant Alamo Express, Inc., is engaged in rendering a common carrier service wholly within the State of Texas over certain specified regular routes, pursuant to authority contained in Docket No. MC-107727 and subs thereunder. Alamo operates a total of 500 vehicles over its entire system and employs a total of 580 people, and its equipment is designed to handle all types of general commodity freight. Alamo maintains modern and efficient terminals at many points throughout its system of routes.

Protestant Brown Express, Inc., operates in interstate commerce pursuant to authority issued in Docket No. MC-46054 and subs thereunder. Brown employs approximately 900 full-time experienced employees and owns and operates over 800 units of equipment similar to the type operated by Red Arrow, Alamo and Central. It maintains terminals at numerous points over its system of routes.

Collectively, protestants' regular route operations encompass almost all the major population areas and industrial complexes in the State of Texas. The area encompassed by their authority may best be described by stating that the protestants named above can serve practically every village, town, and city within an area bounded on the north by Wichita Falls, Fort Worth and Dallas, on the east by Houston, Beaumont, Orange, and Galveston, on the south by Brownsville and other points in the Rio Grande Valley, and on the west by Laredo, San Antonio

and Brownwood. Each protestant's list authority is quite voluminous and quite difficult to explain. It is believed the description of the authority given above is both the simplest and clearest method of describbting the scope of protestants' operations. However, if applicant or the Commission desires copies of protestants' authority and route maps, copies will be forwarded upon request.

Protestants offer daily scheduled overnight service between all points served direct, as well as a service on call for the movement of volume shipments. Although protestants do not serve direct any points located outside the State of Texas, protestants are presently providing service for the transportation of general commodities from points in Texas, on the one hand, and, on the other, points in the involved States of Washington, California, Nevada, and Arizona by interline and equipment interchange with other authorized carriers serving those states under long-standing agreements and tariff concurrences. A major portion of protestants' revenues are derived from such interline service. Interlining occurs at all major Texas cities.

Therefore, applicant's proposal is in direct conflict with existing services now being provided by the above named regular route carriers through interline with other carriers authorized to serve the four state area sought to be served by applicant from and to points within the State of Texas.

Irregular Route Protestants

(1) *J. H. Rose Truck Line, Inc.* Protestant Rose is a motor common carrier, operating over irregular routes, performing a call and demand service in the transportation of size and weight commodities, *Mercer* description commodities, pipeline equipment, contractors' machinery, equipment, materials and supplies, and related commodities pursuant to Certificate No. MC-13250 and subs thereunder.

As here pertinent, Rose holds authority under its Base Certificate and its Subs 45, 59, 68, 76 and 80 which is in

direct conflict with the services sought to be provided by the applicant. Possible conflicts exist between applicant's proposal and Subs 60, 62, 70, 75, 79 and 82 of Rose's authority.[1] Tacking possibilities exist between many of the subs listed and Rose would tack its authority to provide the broadest service possible. In order to provide service to, from or between any involved points which Rose is not authorized to serve direct, Rose would engage in interline and through equipment interchange operations under long-standing agreements and tariff concurrences with other carriers authorized to serve the involved states.

Rose maintains its headquarters and principal terminal in Houston, Texas, and also maintains terminals in other states in which it operates. A list of Rose's terminals, equipment and representative pictures thereof appear in the brochure attached and referred to in Footnote 1, above. Protestant Rose has been operating throughout the area here involved for many years and invested vast sums of money in equipment, facilities and authority necessary to operate therein. It is not operating to capacity and denies that there is an immediate or urgent need for the additional competitive motor carrier service in that area.

(2) *J. J. Willis Trucking Company.* Protestant Willis is a motor common carrier operating in both interstate and intrastate commerce pursuant to authority issued by the Interstate Commerce Commission in MC-107993 and subs thereunder, as well as various State regulatory bodies. It is an irregular route, call and demand carrier transporting *Mercer* description commodities, commodities requiring special equipment, and various other classes of commodities. Applicant's proposal would conflict with this pro-

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[1] In each case where specific portions of a protestant's authority are referred to a copy of that carrier's existing authority has been attached to the copy of this protest mailed to the applicant's representative and to the original copy of this joint protest filed with the District Supervisor shown in the Federal Register.

testant's Base Certificate and Subs 8 and 11, and possibly conflict with its Subs 6 and 10. Tacking possibilities exist between these subs. In order to provide service to, from or between any of the involved states which it does not serve direct, protestant Willis would engaged in interline and through equipment interchange with other carriers authorized to serve those states under long-standing agreements and tariff concurrences.

(3) *J. V. Harrison Truck Lines, Inc.* Protestant Harrison is an irregular route, call and demand carrier operating in both interstate and intrastate commerce, specializing in the transportation of iron and steel and iron and steel articles size and weight commodities, and related commodities, between all points in Texas pursuant to Certificate of Registration No. MC-85715 and subs thereunder. Although protestants' single-line operations are confined to the State of Texas protestant would provide service to, from and between the four involved origin and destination states and all points in Texas by interline with reliable connecting carriers under long-standing interline and equipment interchange agreements. A copy of protestant's authority is attached.

(4) *H. S. Anderson Trucking Company.* Protestant Anderson is a motor common carrier holding certificates of convenience and necessity from the Interstate Commerce Commission in Docket MC-97068, and subs thereunder. H. S. Anderson Trucking Company is presently authorized to transport so-called *Mercer* description commodities, heavy and cumbersome commodities, sulphur industry commodities, earth drilling commodities, structural and plate steel, reinforcing steel, tank steel, contractors' machinery, equipment and supplies, and various other specified commodities. The company is an irregular route, call and demand carrier. The company is presently authorized to provide single-line services in the States of Louisiana, Texas, and Alabama. However, this protestant would

provide service on shipments to or from the involved points beyond its authorized territory by interline and equipment interchange with connecting carriers authorized to serve such points. A copy of protestant's authortiy is attached.

(5) *Miller Truck Line, Inc.* Protestant Miller is a motor common carrier operating in both interstate and intrastate commerce pursuant to authority issued by the Interstate Commerce Commission in MC-118034 and subs thereunder, and various State regulatory bodies. Protestant Miller is an irregular route, call and demand carrier engaged in the transportation of meats, packing house products, fruits, vegetables and other similar type perishable products. This protestant is authorized to operate in the States of Texas, Oklahoma, Louisiana, Arkansas, New Mexico, Alabama and mississippi and is transporting commodities here involved to, from and between specified points in those states. Although this protestant does not serve direct any of the four origin and destination states involved in the instant application, protestant would engage in interline and through equipment interchange with carriers authorized to serve points in those states. A copy of protestant's authority is attached.

(6) *Central Forwarding Inc.* Protestant Central Forwarding is an irregular route, motor common carrier, holding authority from the Interstate Commerce Commission in MC-24670 and subs thereunder, and the Railroad Commission of Texas. Protestant is principally a transporter of household goods, used office furniture and equipment, and other specified commodities. Protestant Central Forwarding Inc., operates to, from or between specified points within the States of Texas, New Mexico, Arkansas, Oklahoma, Kansas and Louisiana. Although this protestant offers no direct, single-line service to any of the four involved origin and destination states, it does engage in interline operations with other carriers authorized to serve those states. A copy of protestant's authority is attached.

(7) *Robertson Tank Lines, Inc.* Protestant Robertson is a motor common carrier operating over irregular routes, performing a call and demand service in the transportation of acids, chemicals, petroleum and petroleum products and other specified commodities, principally in bulk. It operates in interstate commerce pursuant to authority granted by this Commission in Docket MC-116077 and subs thereunder. By virtue thereof, Robertson operates in practically all of the contiguous 48 states. Robertson operates in excess of 857 pieces of equipment, which include some 347 truck-tractors and 510 trailers of all types and kinds. Applicant's proposal would be in direct conflict with protestant Robertson's existing Subs 6, 8, 64, 77 and 78, 82, 118, 120, 136, 166, 178 and 203. Tacking possibilities exist between these various subs.

Because of the broad nature of the authority sought, both commodity-wise as well as territorial scope, each of the above named protestants believed that they have a major interest in applicant's proposal and that a grant of such proposal would result in a reduction of their revenues and create duplicating authority to that now held by them, all of which would be destructive of sound economic conditions in regulated transportation.

All of the above protestants operate suitable equipment to transport the involved commodities, are financially capable, and are not operating to capacity. If called upon to do so by the Department of Defense these carriers either individually or collectively are authorized to transport and willing to transport the commodities involved in the instant application providing a direct, single-line service or connecting-line service to all of the states here involved from points in the states they are authorized to serve, and vice versa.

The Department of Defense in its letter dated May 15, 1968, has done nothing more than make general allegations about satisfaction with the prior services of applicant and

a desire for continuous use of applicant on a regulated basis. No criticism was levelled at existing carriers and no allegations of failure to provide needed service were made by the Department of Defense. The Commission's regulations governing the grant of motor carrier temporary authority, Section 240.4(b), Subparagraphs (1) through (8), conclusively and specifically require the showing of an immediate and urgent need for the transportation of commodities from specified origin points or areas to specified destination points or areas where *no carrier service* capable of meeting such needs is available. An immediate and urgent need justifying a grant of temporary authority to an applicant will be determined to exist only where it is established that there is or soon will be an immediate transportation need *which reasonably cannot be met by existing carrier service*. Such can be proven by evidence showing that new or relocated plants are involved, new or unusual commodities are involved, origins and destinations not served by existing carriers, a discontinuance of existing service, or failure of existing carriers to provide service. No such showing has been made by the applicant or its supporting shipper.

Protestants further say that the supporting shipper in the involved application, to-wit, the Department of the Army, Office of Judge Advocate General, is not the proper office within the Department of the Army to lend support to an application before the Commission. Army Regulation 55-355 provides, among other things, that participation by representatives of the military departments in proceedings involving operating authority are to be undertaken only when the Commander, Military Traffic Management and Terminal Service, determines that *no carrier* is authorized to render the service required by the Department of Defense or that the existing services of authorized carriers are inadequate to fulfill the needs of the Department of Defense. As stated above, no such showing has been made and protestants say that it is beyond reasonable belief that

the Military Traffic Management and Terminal Service could ever make such a prerequisite finding concerning the broad territorial and commodity description proposed by the applicant.

Additionally, protestants respectfully submit that the sole basis for support of the application rests in rate considerations which is not a criteria in a temporary authority proceeding, and, therefore, cannot be properly considered. Fitness, however, is a proper consideration and in such connection reference is directed to *Munitions Carriers Conference, Inc., et al.* v. *American Farm Lines, et al.*, Civil Action No. 67-487, U.S.D.C., Oklahoma (1968) wherein a Federal District Court permanently enjoined applicant from the performance of unlawful "back-to-back" (round trip) transportation on behalf of the Government.

Subparagraph (8) of Section 240.4(b) of the Commission's regulations concerning the grant or denial of temporary authority applications reads as follows:

> "(8) *General basis for disproval.* Applications for temporary authority may be denied for the following reasons:
>
> "(i) Failure to meet statutory standards.
>
> "(ii) Unfitness of the applicant."

Protestants respectfully submit to the Commission that the applicant has (1) failed to meet the statutory standards in that neither it nor its supporting shipper made any proof of an immediate and urgent need which cannot be met by existing carriers, and (2) that applicant is unfit to provide such services because of its prior judicially determined illegal operations.

WHEREFORE, premises considered, protestants deny that there is any immediate or urgent need for the services

proposed in the application and pray that the application for temporary authority be denied.

Respectfully submitted,

THOMAS E. JAMES
PHILLIP ROBINSON
DAN FELTS
PAT H. ROBERTSON
Attorneys for Protestants
Central Freight Lines Inc.
Central Express Inc.
Red Arrow Freight Lines, Inc.
Brown Express, Inc.
Alamo Express, Inc.
J. H. Rose Truck Line, Inc.
J. J. Willis Trucking Company
J. V. Harrison Truck Lines, Inc.
H. S. Anderson Trucking Company
Miller Truck Line, Inc.
Central Forwarding Inc.
Robertson Tank Lines, Inc.

Of Counsel:

JAMES, ROBINSON, FELTS
& STARNES
The 904 Lavaca Building
Austin, Texas 78701

DUE DATE:
June 12, 1968

CONSOLIDATED FREIGHTWAYS

June 4, 1968
File: H6-TA

Mr. C. L. Phillips
District Supervisor
Interstate Commerce Commission
Bureau of Operations
Room 350, American General Building
210 Northwest Sixth
Oklahoma City, Oklahoma 73102

Re: MC 129908 TA—AMERICAN FARM LINES

Dear Mr. Phillips:

This protest to grant of temporary authority in the above application, is filed by Consolidated Freightways Corporation of Delaware (MC 42487), 175 Linfield Drive, Menlo Park, California. Consolidated Freightways Corporation of Delaware, herein called "Consolidated" is a common motor carrier of general commodities, with exceptions not here pertinent, operating in interstate commerce over regular and irregular routes, as set forth in its certificate, Docket No. MC 42487 and subs.

Consolidated operates over regular and irregular routes throughout the States of Washington, California, Nevada, Arizona and Utah, as well as Kansas, Missouri, Illinois, Indiana and Kentucky, under authority held in Docket No. MC 52487 and subs. Points in Texas, Oklahoma and Arkansas, as well as some points in Missouri and Illinois are served by Consolidated Freightways Corporation of Delaware, Operator of Southern Plaza Express, Inc. (MC 10928), which is operated under temporary authority in MC-F-9041. Points in Kentucky are served by Consolidated Freightways Corporation of Delaware, Operator of Dance Freight Lines, Inc. (MC 107475) and Reliance Trucking Co., Inc. (MC 65897), which is operated under temporary authority in MC-F-9902. Certain points in California

are served by Consolidated Freightways Corporation of Delaware, Operator of Aetna Freight Lines, Inc. (MC 99196), which is operated under temporary authority in MC-F-9864. Points not on the routes served by Consolidated are served in joint-line service with reliable connecting carriers. Points in Louisiana are served in this manner. Joint routes, through rates and through trailer agreements are effective with hundreds of connecting carriers, thus assuring service to virtually any point. A folder generally depicting these operations is attached.

Consolidated maintains terminals throughout the states in which it is authorized to serve. The location of these terminals can be noted in the attached folder. Consolidated continually makes substantial investments in terminal facilities, so that it can offer a modern, responsive service to the shipping public.

Consolidated regularly operates plywood lined van trailers, suited to the transportation of general commodities including explosives, in its fleet of 10,000 units of equipment. Each terminal can quickly supply appropriate equipment as needed. Thus, a shipper need only contact his nearest terminal, and appropriate equipment can be furnished. The equipment is not fully utilized, but in the event that added traffic requires additional equipment, such equipment will be added. As indicative of its ability, Consolidated invested over $12,000,000 in revenue equipment during 1967.

Consolidated provides an abundance of service between the points here involved. There are numerous other interstate freight common carriers who can and do provide service between the points here discussed, in addition to the service of Consolidated. Clearly, there is an abundance of service available to the shipper supporting this application.

Consolidated employs a large sales force stationed throughout its nationwide system. It employs a representa-

tive, stationed at Washington, D. C., whose duties include sales liaison with various U. S. Government agencies, including the Department of Defense. The traffic within the instant application is actively solicited by Consolidated.

Consolidated opposes this application on several grounds: 1) *That there is no immediate and urgent need for the service proposed.* The circumstances that caused this application to be filed result from the injunction entered by the United States District Court for the Western District of Oklahoma which forbids applicant from engaging in "back-to-back" transportation service. To grant this application would allow applicant to perform that the Court has ordered otherwise illegal.

2) *That the statement of the supporting shipper is not in reasonable compliance with the rules in Ex Parte No. MC-67.* The shipper has not supplied the detailed statement of its needs, as required in Ex Parte No. MC-67. It can be understood, of course, that purposes of national security may prohibit the release of certain information. Consolidated asserts, however, that this does not mean the shipper can utterly fail to supply the information required by your Commission to reach an informed decision.

3) *That the purpose of applicant is repugnant to the decision of your Commission in Ex Parte No. MC-68.* In Ex Parte No. MC-68, *Removal of Truckload Lot Restrictions,* your Commission has held that where a motor common carrier holds a certificate of public convenience and necessity authorizing general commodities operations, such authority should not be limited to "truckload lots". As Consolidated understands the Commission's order, if a person is to engage in the business of transporting general commodities, as a common carrier by motor vehicle, then that person has the responsibility to transport all traffic tendered. How can applicant satisfy this responsibility? Particularly the responsibility for small shipments transportation? Apparently, it cannot. Applicant does not indi-

cate that it has a system of terminals, a fleet of city delivery equipment, or any of the required investment to engage in small shipments transport. Protestant therefore alleges that applicant merely desires to "skim the cream" and haul truckloads only.

4) *That the shipper is unable to show an immediate and urgent need.* In a letter dated 30 April 1968, from Mr. Curtis L. Wagner, Jr.; Chief, Regulatory Law Division; Headquarters; Department of the Army; Office of the Judge Advocate General; Washington, D. C. 20310 to Mr. Howard McCormack; General Manager; American Farm Lines Co-op; Oklahoma City, Oklahoma 73107, Mr. Wagner states, ". . . I have been asked to reply to *your request* for Department of Defense support . . ." (emphasis added) for the instant application. Protestant asserts that if shipper has immediate and urgent needs, it is curious that applicant should be making request of shipper for support.

Mr. Wagner further states ". . . the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines." Protestant further notes that in a letter dated 15 May 1968, from Mr. Wagner to Temporary Authority Board, Interstate Commerce Commission, Washington, D. C. 20423, Mr. Wagner makes no statement that there ". . . would be insufficient or inadequate service without American Farm Lines".

Protestant must assert, therefore, that the shipper would in no way be injured should the instant application be denied.

5) *That the primary appeal of applicant, although unstated, is the offer of lower rates.* It has been Consolidated's experience that in nearly every instance where applicant proposes to transport traffic where it is in competition with other carriers, that it attracts this traffic through the offer of lower rates. Consolidated believes applicant

will pursue this rate-cutting policy if this application is granted. Consolidated must therefore assert that the temporary authority procedure was not devised to encourage rate wars, and that no purpose would be served by granting the instant application.

6) *That although shipper refers to "reduced transit times," it does not specify its needs.* Consolidated asserts that it provides good service, and that the service is fully responsive to the shipper's needs. Consolidated further asserts that it can provide a higher quality of service than that proposed by applicant.

Consolidated believes that it provides a service on which the shipper can rely. There are hundreds of other common carriers, which either singly or jointly, provide reliable service. There is no need for service of applicant; in fact, the shipper is unable to state that there would be insufficient or inadequate service without applicant. Thus, the application is wholly defective, and demonstrates no need for service.

Consolidated Freightways Corporation of Delaware respectfully submits, therefore, that the application should be denied.

Respectfully submitted,

CONSOLIDATED FREIGHTWAYS
CORPORATION OF DELAWARE

V. S. TYLER
Commerce Supervisor

DEALERS TRANSIT INC.

June 6, 1968

Mr. C. L. Phillips, District Supervisor
Interstate Commerce Commission
Room 350—American General Building
210 Northwest Sixth Street
Oklahoma City, Oklahoma 73102

Re: American Farm Lines—MC 129908 TA

Dear Mr. Phillips:

This letter and attachments will serve to register our most vigorous protest against the above captioned application for 180 day temporary authority between four far western states on the one hand, and on the other, nine middlewestern and southwestern states.

This protestant, a common carrier by motor vehicle operating under Certificate MC-4405 and subs thereto, in the course of its operations has had occasion to file and to protest many temporary authority applications, and we are frank to say that, considering the breadth and scope of this proceeding territory-wise and commodity-wise, we have never been involved in an application which so totally violates the letter and the spirit of the regulations which the Commission has promulgated in connection with the processing of temporary authority applications.

At the outset, it should be noted that the statutory authority which the Commission may act on an application for temporary authority, Par. 210 a (a) of the Interstate Commerce Act (49 U.S.C. Par. 310 a (a)) reads as follows:

> "To enable the provisions of service for which there *is an immediate and urgent need to a point or points within a territory having no carrier service capable of meeting such need,* the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common

carrier by motor vehicle, as the case may be." (Emphasis ours)

We should also like to call particular attention to Par. 10 of Form BOR 95 which sets forth the information required in shipper's letter of support for an application:

(a) Accurate description of commodity, quality and frequency of shipments to move, and consequences of denial of this application.

(b) Statement that there is / is not any carrier service available (rail or motor), either single line or by interline, between the points involved. If any service is available, indicate to what extent it has been used, what effort has been made to utilize it, whether carriers with authority have refused to furnish service, the manner and extent that existing services, if any, are inadequate, and detailed reasons as to why additional services are needed. If shipper's support is based on alleged failure of existing carriers to provide service, names and addresses of such carriers must be furnished.

We submit that the letter of support in the instant application fails completely to meet the minimum requirements set forth above. Further, we see nothing in the regulations which permit these requirements to be waived even though the support carries with it the prestige of the higher echelon of the Defense Department. There is not even the slightest allusion to existing service and the reasons why it is alleged to be unsatisfactory. It is axiomatic that a grant of temporary authority may be made only when an immediate and urgent need for service is present, which existing carriers are incapable of providing. Conspicuously absent from the letter of support is any reference to established service. and surely no one

can allege that such does not exist within the expanse of the territorial scope of the application.

Stripped of its superfluous verbiage the true motivation for this application is to be found in the concluding phrase of the second paragraph, "... *resulting in reduced cost to the Government.*" While any effort toward economy in government spending is to be commended, yet the question here involved is whether, considering the consequence of the policy of promoting this type of carrier, the end justifies the means. The emergence of the so-called farm co-op carriers operating under a minimum of regulatory restrictions is an increasingly potent factor in the total transportation picture, particularly as regards government traffic, is one that poses a direct threat to the sound transportation system which the Commission is charged with fostering. Whereas certificated carriers have, over a period of years, developed their service with a substantial investment of capital and labor, the farm co-op carriers through the device of the statutory exemption have been able, abetted by the full cooperation of the Defense Department, to skim off the cream of the available traffic to the detriment of the certified carriers who, if this policy is to be continued, will eventually be relegated to a standby position. Operations of the co-ops have become so flagrantly in violation of the basic rules under which such operations have been permitted that a court injunction was necessary in the case of the applicant to halt what is termed in the letter of support as "back to back" transportation.

One has but to review the various Watching Service reports issued almost daily, setting forth the government tenders which are being issued, to realize the impact of the farm co-ops on the total transportation scene. Pages upon pages of such quotations are being issued, undermining the rate structures—and the financial structures as well—of the certificated carriers legitimately in the field. The ultimate result is all too obvious to those who are

concerned with the continuation of a sound transportation system. The Commission is now being placed in the anomalous position of fostering such a system and at the same time destroying it by being requested to grant applications such as the instant one, which can only serve to render such system ineffective.

The present situation can be compared to the old fable of the camel's entry into the tent—first the nose under the flap with moves under the exemption, followed by the temporary authority application to bring in the front legs, to be followed, in turn, by a permanent authority application by which the hind quarter and the humps will make the entry complete—crowding out the legitimate carriers and completely usurping their functions. Having tasted the cut rates available the Department of Defense is now lending its weight to the destruction of the existing transportation system built up by the carriers under the Commission's regulations, with no thought being given to the long-term, nationwide effects of such a policy.

It is significant that the instant letter of support, at *first glance,* sets the stage for what is intended to be a telling argument by stating that the applicant was required to turn down 700 loads of Defense Department traffic. However, this unsupported statement is left with the obvious questions remaining unanswered—what was the consequence of this turndown and who then *did* handle the traffic? Obviously the traffic *was* handled; equally obvious is the fact that no criticism is voiced as to that service, which must be taken as proof that existing service *is* adequate. Had the writer of the supporting letter been apprised of any specific service deficiencies, notice thereof would surely have been included in his presentation as is in fact required in the previously quoted regulations. In brief, the Commission is now being asked to reward the applicant for its past illegal operations by investing it with the cloak of respectability in the form of appropriate authority.

It is of more than passing interest to note that the same office which now supports this application advised the applicant, under date of April 30, 1968, in answer to a request for support of an application: "However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines." This quotation appears in the American Trucking Associations Government Traffic Bulletin under date of May 15, 1968 and has, therefore, become public information. The Department thus frankly acknowledged that in supporting an application it would actually have no legitimate basis for doing so.

An attempt is made in the letter of support to justify the application on the basis of a need for expeditious service and for "shortening the pipeline". The weight of this argument cannot survive careful analysis since by what reasoning can it be concluded that a farm co-op has any monopoly on the ability to afford expeditious service? Surely a co-op by its very nature and antecedents lacks the organization and managerial expertise to be found with an existing carrier whose routine dispatch procedures are already in operation and are geared to offer the most expeditious service possible within the established safety rules. The co-op is actually in a less favorable position to render expeditious service than is the certificated carriers. There can be but one conclusion in this regard—that the highly touted expeditious service can be achieved only at the sacrifice of safety, a matter which should be of the gravest concern to the Commission and to the Department of Transportation in their function of protection of the public. The entire matter of applicant's fitness is certainly one which should be of definite concern to the Commission.

Moving on to the particulars of the application, it is noted that unrestricted general commodity authority is sought. Without any exclusions or exceptions, the entire spectrum of commodities is embraced, including heavy and

cumbersome commodities, explosives, liquid and bulk commodities, motor vehicles—all in addition to what is normally included in the general commodity field. Any grant of the scope requested would most certainly vest the applicant with the most valuable authority extant between the territories involved.

This protestant's direct interest in this application lies in the field of heavy hauling plus motor vehicle transportation (including the transportation of trailers). We are confident that the regular general commodity carriers will seek to protect their interests through their own protests and we will, therefore, direct our protest to our own areas of major interest. We append hereto as Appendix A a complete list of our presently held certificates from the Interstate Commerce Commission under docket MC-4405 and subs, to which specific references will be made below.

Under Dealers Transit's authority on the movement of "commodities which because of size or weight require the use of special equipment", direct service is available as follows:

Between	And:	Authority
Kentucky, Indiana and Arkansas	California, Arizona, Nevada	Subs 391, 353 and 400
Oklahoma, Missouri and Kansas	California, Arizona, Nevada	Subs 384, 353 and 400
Texas and Louisiana	California, Arizona, Nevada	Subs 353 and 400

Parallel with the authority on "heavy and cumbersome commodities" is the so-called "15,000 pound" authority covering the movement of self-propelled vehicles of 15,000 pounds or more in weight. Such authority is included in Sub 403, also carried in Appendix A, where it will be noted that wherever "heavy and cumbersome" authority exists territorially there is concurrent "15,000 pound authority".

Additionally. through interline with other carriers, service between Illinois and the three western states named above, can be rendered through our Subs 416, 384. 353 and 400. The pertinent portions of each of the above named subs are checked in red in Appendix A.

With reference to the motor vehicle authority, it should be noted on page 5, Appendix A, that secondary truck-away authority on the movement of trailers is held between all points in the 48 contiguous states. This, of course, completely covers the territorial scope of the application. Added to this is the large number of specific initial authorities which are involved within the scope of the application. Such authorities are held in the grandfather order to the western states from Joliet, Ill.; Minneapolis, Minn.; and North Kansas City, Mo., eastbound from Los Angeles and Berkeley, California to one or more of the involved states. These authorities are checked in red in Appendix A, for ready reference.

In the interest of brevity, no attempt will be made to break down in detail the specific authority. Suffice it that the following subs do afford service from and to the territory involved on the initial movement of trailers:

Subs 263, Puente, Cal.; 271, Gregg Co., Tex.; 279, Vina Vista, Cal.; 286, Cambridge City, Ind.; 295, Fresno, Cal.; 304, Ft. Worth and Cleburne, Tex.; 317, Mansfield, La.; 321, Michigan City, Ind.; 323, San Antonio. Tex.; 324, Oklahoma City, Okla.; 326, Lufkin, Tex.; 329, Joplin, Mo.; 334, West Plains, Mo.; 339, Jerseyville, Ill.; 347, Augusta, Kas.; Minden, La.; 349, Fremont, Cal.; 351, St. Louis, Mo.; 352, Springfield, Mo.; 355, Baton Rouge, La.; 360, Matton, Ill.; 373, Modesto, Cal.; 374, El Paso Co., Tex.; 378, Los Angeles, Cal.; 379, Tulsa, Okla.; 386, Hayward, Cal.; 388, Riverside, Cal.; 394, Rockwall, Tex.; 395, Brady, Tex.; 406, Neodesha, Kas.; Monee, Ill.; 420, Bryan Co., Okla.; 425, Champaign, Ill.; 438, Stockton, Cal.; and 442, Ashdown, Ark.

In addition, Sub 389 provides authority on the movement of cargo containers from Ft. Wayne, Ind., Fresno, Vina Vista and Fremont, Cal., Gregg Co., Texas and Springfield, Mo.; Sub 336 provides authority on road construction machinery from Evansvillle, Ind.; and Sub 419 provides authority on the movememt of bodies, refuse containers, hydraulic hoists and lift gates from Bryan Co., Oklahoma.

Time and space do not permit a listing of all of the traffic moving via Dealers Transit, Inc. on the basis of the authorities named above, within the scope of the instant application. A conservative estimate would be that it would represent at least $2,500,000 in revenue, of which in excess of 50% would be movememt on government bills of lading. It, therefore, can be seen that any incursion by applicant into this area would be a most serious threat to the traffic potential of Dealers Transit, Inc.

The fact that this protestant is equipped to handle the traffic for which it is certificated, is evidenced by Appendix B which is a listing of equipment by type and ownership. It will be noted that a variety of trailer types—flatbeds, lowboy, drop centers, pole trailers—as well as specialized units such as for the movement of aircraft engines and boats—are available. The number of tractors appears proportionately greater than the number of trailers for the reason that, as indicated above, this protestant handles a considerable volume of deliveries where the trailer itself is the lading, such operation requiring only the use of carrier's tractor and driver. The large number of sleeper cabs should be noted, indicating the availability of expeditious service through use of two man driver teams.

Appendix C hereto is a listing of management personnel and terminal locations. It should be noted that of the states involved in this application terminals are located in the states of California (2), Indiana, Illinois, Oklahoma, Missouri (2), and Texas.

The movement of carrier's men and equipment is controlled by a central dispatch system headquartered at the central office at Chicago. The location of equipment is known at all times and through the operations of five "area controllers" it is possible to dispatch equipment to a given origin without necessarily deadheading such equipment in from the nearest terminal. This information becomes known to the area controllers through a teletype hookup between terminals and the main office and by inbound and outbound WATS telephone lines. The nature of protestant's operation is such that equipment is distributed throughout the nation and becomes available to points as needed through the effective control exercised by the central dispatch system.

This protestant regularly handles traffic requiring service over and above that involved in routine operations. Overdimension loads are frequent and are handled under the supervision of a special permit department whose efforts are devoted full time to the details involved in operations under permit. Escort cars, extra drivers, flagmen and guards are used regularly and are available through protestant's own facilities as well as from outside sources, as needed. Expeditious service through the use of sleeper cabs and second drivers is readily available, as previously indicated.

Safety of operation is a prime consideration of this protestant. To augment its efforts in this regard, four regional safety supervisors have been added recently with the primary function of implementing a driver selection and training program looking toward maximum safety in operations. It should also be noted that this protestant carries insurance considerably in excess of the requirements of the Commission, thereby affording both shipper and public the highest degree of protection.

In view of the foregoing, this protestant earnestly requests that the Commission follow the requirements which

it has set up for the handling of temporary authority applications and deny the instant request of American Farm Lines. There is not one scintilla of evidence which would support a grant of any authority whatsoever. Established carriers must necessarily look to the Commission to withstand the pressures of another arm of the government and to protect them against an action which would most certainly be detrimental to them and, more importantly, to the nation as well. Surely there is no more appropriate time than the present for the Commission to reaffirm the policy which is set forth so succinctly in *Smith and Solomon* 61 MCC 728 at page 752 when it said:

> "A certificate is a legal privilege. Unless we protect it, we destroy its value. We cannot expect motor carriers to carry out their obligations if we create situations which subvert their efforts to render adequate and efficient service. * * *
>
> As each such problem arises, a determination can be reached only after considering the existing carriers and the services which they are offering and entitled to offer to the public within the limits of their authority at this time. Again, it seems obvious that we cannot promote the cause of one carrier without considering the effect on other carriers and the public. Such a course would open the door to many problems which would damage the industry and the public interest, as well as defeat the objectives of the National Transportation Policy."

Very truly yours,

DEALERS TRANSIT, INC.

R. O. HOMBERGER

R. O. Homberger
Vice President—Traffic

MAURICE H. GREENE
ATTORNEY AT LAW
334 FIRST SECURITY BANK BUILDING
BOISE, IDAHO

June 7, 1968

Mr. C. L. Phillips, District Supervisor
Interstate Commerce Commission
Bureau of Operations
Room 350 American General Building
210 Northwest Sixth
Oklahoma City, Oklahoma 73102

Re: Temporary Authority Application. MC-129908 TA, American Farm Lines, 641 N. Meridian, Oklahoma City, Oklahoma, 73107 Federal Register—May 28, 1968, page 7796.

Dear Mr. Phillips:

I have been authorized by Garrett Freightlines, Inc., of Pocatello, Idaho, to protest the above-captioned temporary authority application of American Farm Lines, wherein it seeks authority to transport general commodities, including Class A and B explosives, restricted to traffic moving on government bill of lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada and Arizona.

Garrett Freightlines, Inc., (hereinafter referred to as Garrett), is a motor common carrier of property engaged in the transportation of general commodities, with the usual exceptions, over a network of regular routes in thirteen western states. It operates under certificates of convenience and necessity No. MC-263 and outstanding sub numbers. Included in this authority is authority to transport Class A and B explosives between Denver, Colo-

rado, on the one hand, and, on the other, Los Angeles and San Francisco, California, Portland, Oregon, and Seattle, Washington, including service at all intermediate points on U. S. Highway 91 between Salt Lake City, Utah, and Los Angeles, all intermediate points on U. S. Highway 40 between Wells, Nevada, and San Francisco, all points on U. S. Highways 30S and 30 between Salt Lake City, Utah, and Portland, Oregon, and all intermediate points over a network of regular routes between Pendleton, Oregon, and Seattle, Washington. In the area in which it operates Garrett serves hundreds of government installations and daily participates in the movement of traffic under government bills of lading. Included in this volume of traffic moving under government bills of lading is a tremendous movement of dangerous explosives that is received by Garrett at Denver, Colorado, through interline with carriers operating east of Denver and who serve military installations in the states of Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas. Garrett's major interline carriers on government traffic are Leeway Motor Freight, Interstate Systems, and Riss & Company. To give you some idea of the volume of dangerous explosives traffic Garrett has transported during the months of January and February, 1968, it received through interline at Denver over 150 truckloads of dangerous explosives, most of which originated in Oklahoma. This traffic was destined to the San Francisco Bay area and the Puget Sound area for shipment overseas. Garrett has handled as many as 18 truckloads of dangerous explosives in a single day through the Denver gateway.

Garrett also interlines a substantial volume of traffic moving under government bill of lading through the Minneapolis gateway. It interchanges traffic with approximately 24 carriers that operate between Chicago and Minneapolis.

Garrett operates in excess of 3,000 units of motor vehicle equipment. It operates some 70 terminals in the

area in the western part of the United States in which it operates. It has various types of trailers, such as flat-racks, vans and units equipped with mechanical refrigeration. All of its van equipment is suitable for and is used in the transportation of dangerous explosives.

Garrett regularly interchanges trailers with connecting carriers. It is a party to the National Motor Carrier Trailer Interchange Agreement. This interchange arrangement includes providing "exclusive use of the vehicle" service, which is regularly utilized by the government in the transportation of military traffic.

I have examined the letter of support by the Department of the Army, which is the only shipper supporting the temporary authority application of American Farm Lines. The letter does not comply with the regulations of the Commission concerning temporary authority applications. Particularly, the letter does not set forth what effort has been made to obtain the services of existing carriers and does not name any carrier that has refused service on government traffic when tendered to it. In fact, the only statement concerning traffic is that "American Farm Lines has been required to turn down more than 700 truckloads of Department of Defense traffic." This statement certainly does not indicate any absence of service for the transportation of government traffic or any inadequacy in the existing services. Garrett submits that because American Farm Lines was enjoined by the United States District Court for the Western District of Oklahoma from performing a type of transportation found by the court to be unauthorized certainly does not alone justify a grant of temporary authority to it. In the absence of any statement by the Department of Defense of inadequacy in the other motor carrier service available to it, the only purpose a grant of temporary authority to American Farm Lines would serve would be to circumvent the court injunction. Garrett respectfully submits that Section 210 of the Act providing for grants of temporary authority does

not contemplate that it should be used merely for the purpose of circumventing a court decree if there is ample motor carrier service available in the area in which temporary authority is sought.

Garrett operates only company-owned equipment, except in the interchange of trailers with other carriers. It has a fulltime safety director. Its drivers are specially instructed in the Commission's safety rules with respect to the transportation of dangerous explosives. Garrett has never been prosecuted for a violation of the Commission's safety rules and regulations.

A copy of this letter is being forwarded to the applicant and to its representative, Wesley L. Johnson.

Very truly yours,

MAURICE H. GREENE
Maurice H. Greene, Attorney for
Garrett Freightlines, Inc.
334 First Security Bank Building
Boise, Idaho, 83701

HERRIN TRANSPORTATION COMPANY

June 6, 1968

Mr. C. L. Phillips
District Supervisor,
Interstate Commerce Commission
Bureau of Operations
Room 350
American General Building
210 Northwest Sixth Street
Oklahoma City, Oklahoma 73102

Re: American Farm Lines. No. MC 129908 TA

Dear Mr. Phillips:

Herrin Transportation Company hereby protests the temporary authority application of American Farm Lines

as published on Page 7796, in the Federal Register of May 28, 1968.

Applicant seeks common carrier authority over irregular routes, transporting general commodities including class A and B explosives, restricted to traffic moving on Government Bill of Lading, between points in Kentucky, Indiana, Illinois. Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas on the one hand and on the other points in Washington, California, Nevada, and Arizona.

Protestant, Herrin Transportation Company, holds authority from the Interstate Commerce Commission in Dockets MC 1124 and Subs thereto to conduct operations, transporting general commodities, including class A and B explosives, within the states of Arkansas, Louisiana and Texas. A copy of Herin's Certificate is attached hereto. Herrin maintains terminal operations and facilities at Memphis, Tennessee; Beaumont, Dallas, Houston and Waco, Texas; Abbeville, Alexandria, Baton Rouge, Houma, Lafayette, Lake Charles, Monroe, New Orleans, and Shreveport, Louisiana; and Little Rock, Arkansas. Herrin maintains interchange agreements with all reliable motor common carriers at Memphis, Tennessee, Houston and Dallas, Texas where it daily interchanges general commodities including classes A and B explosives moving on Government Bill of Lading to and from points in Washington, California, Nevada, and Arizona.

Protestant alleges that it is ready, willing and able to transport this traffic described in the above filed application, and further submits that it is now transporting such traffic on a regular daily basis through interchange service with numerous connecting carriers over the Memphis, Dallas, and Houston gateways. A disruption of this traffic now enjoyed by the protestant, through the grant of the instant application, would be a disastrous consequence to the protestant's present operations. This traffic is sorely needed by the protestant for the conduct of its present

operations, schedules, and service to the shipping and receiving public, including Government Installations.

Protestant further submits that the application totally fails to comply with the Commission's special procedures for motor temporary authority with regard to supporting statements to be submitted by each person supporting the application. Herrin submits that any grant of the application in part or total would be contrary to law and with complete disregard to Commission's own rules of practice and procedure.

Protestant submits that the subject temporary authority application should be in all things, denied for the reason that there is no basis within law upon which such application can be granted. There is at present an abundance of motor common carriers service between points within the territory sought, and it has not been shown and can not be shown that an additional grant of authority is in the public interest. The issues involved herein are of such magnitude that if any disposition is to be made of them by the Interstate Commerce Commission, it should only be made after a full hearing with the opportunity preserved for all parties to clearly provide the Commission will all facts.

Wherein, premises considered, protestant respectfully request that the above styled application be in all things denied.

Your very truly,

HERRIN TRANSPORTATION COMPANY

GARY D. BRONSON
Director of Operating Rights

ICX

SETTING THE TREND IN TRUCKING
510 EAST 51ST AVENUE
DENVER, COLORADO 80216
PHONE (303) 825-7011

June 11, 1968

Mr. C. L. Phillips, District Supervisor
Interstate Commerce Commission
Bureau of Operations
Room 350, American General Building
210 Northwest Sixth
Oklahoma City, Oklahoma 73102

Re: American Farm Lines, MC 129908 (Sub-No. — T.A.)

Now comes Illinois-California Express, Inc., (hereinafter referred to as I.C.X.) a class I motor common carrier of general commodities with the usual exceptions, operating in interstate commerce under authority of Certificate No. MC-48958 and Subs. appended thereto (copy of which is attached), and files its protest to the above-referenced proceeding on the following grounds:

I

By the above-referenced application, applicant seeks authority to operate as a common carrier, by motor vehicle, over irregular routes. transporting: General commodities including classes A and B explosives, restricted to traffic moving on government bills of lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washington, Utah, California, Nevada and Arizona, for 180-days.

II

If granted, the authority sought would conflict with protestant's authority as shown by the attached copy of Cer-

tificate MC-48958 and Subs. under route ("Rt.") numbers 1-4, 9-18, 27-33, 35-37, 39-73, 76, 86-87, 149-150, and alternate routes in Subs. 92-95. (See map attached). If interlining with other reliable carriers is necessary for through movement, it could be accomplished at such terminal points as: Chicago, Illinois; Dallas, Amarillo, Lubbock, Witchita Falls and El Paso, Texas; Flagstaff, Arizona; Denver, Colorado; Los Angeles and San Francisco, California. I.C.X. regularly interlines traffic with a large number of carriers at all gateways. Examples of these are:

East Texas Motor Freight, Inc.
Texas Oklahoma Express, Inc.
Lee Way Motor Freight, Inc.
T.I.M.E. Freight, Inc.
D-C International, Inc.
Riss & Company
Navajo Freight Lines, Inc.
I.M.L. Freight, Inc.
Pacific Intermountain Express Company

III

Protestant, I.C.X., has invested a substantial amount of money in equipment and facilities to serve all classes of the shipping public which it is authorized to serve and in so doing conducts extensive interstate operations in the States of Texas, Colorado, New Mexico, Arizona, California, Nevada, Nebraska, Iowa and Illinois. Many of the points served by I.C.X. are port facilities and government installations.

In past years, I.C.X. has filed for appropriate authority to serve government installations in the area of its operations, even though these sites were often located at very inconvenient off-rout points. This is but one example of the many instances where I.C.X. has met the needs of the Department of Defense.

The following list is comprised of specific examples of I.C.X.'s authority to serve government installations:

Rt. 1	U.S. Army Training Site No. 3.
Rt. 5	Denver Federal Center.
Rt. 6	United States Atomic Energy Plant at or near Marshall, Colorado.
Rts. 8, 86 & 87	U.S. Engineer's Project No. 76.
Rt. 32	Glenn L. Martin plant near Waterton, Colorado.
Rt. 33	Glen Canyon Dam Site.
Rts. 35 & 36	Atomic Energy Commission plant site near Mercury, Nevada.
Rt. 38	U.S. Missile Launching Sites near Roswell, N.M.
Rt. 74	U.S. Missile Launching Sites in Chaves and Lincoln Counties, N.M.
Rt. 76	U.S. Missile Launching Sites in Texas.
Rt. 79	Pantex Ordnance Plant near Amarillo, Texas.
Rt. 79	Amarillo U.S. Army Air Force Base.
Rt. 80	U.S. Helium Plant near Soncy, Texas.
Rt. 81	Training Camp No. 2 near Moriarty, N.M.
Rt. 92	U.S. Air Training School near Roswell, N.M.
Rts. 123, 124 and 125)	Atomic Energy Commission's plant at Los Alamos, N.M.

Very little of the traffic tendered to I.C.X. on government bills of lading either originates or is destined to the points cited above. I.C.X. serves thousands of cities where

it receives traffic coming from or going to government installations. This traffic amounts to a considerable portion of I.C.X.'s total revenues. I.C.X. maintains a separate division in its traffic department, the sole responsibility of which is to file Section 22 rate quotations and investigate the need for greater authority or new services for the government. I.C.X. wants and actively solicits government traffic.

IV

I.C.X. operates and maintains 83 terminals and stations over its system and employs nearly 2,000 people on a full-time basis. I.C.X. utilizes a modern, well maintained fleet of 2,604 pieces of equipment stationed throughout its authorized territory, including several off-line trailer pools for the use by any off-line shipper. I.C.X. has invested a considerable amount of money in trailers built to the specifications of the A.E.C. for use in transportation of High Explosives and Radioactive Materials. These HEARM trailers are tangible proof that I.C.X. is willing to go to extremes to serve the Department of Defense as well as other governmental agencies.

I.C.X. is a party to the National Motor Equipment Interchange Agreement and freely interchanges equipment, with or without lading, with all other authorized carriers. Protestant's equipment is diversified and capable of safely and efficiently transporting any authorized commodity, including classes A and B explosives sought by the subject application. I.C.X's large fleet is not being fully utilized at the present time, but should the occasion ever arise where more equipment is needed, I.C.X. is financially able to meet that demand.

V

Protestant is actively serving the public convenience and necessity within its authorized territory, portions of which are involved in the instant application, on a daily basis

both in less-than-truckload scheduled service and in call and demand volume service. I.C.X. has over 30 years experience in the handling of general commodities and strongly denies that there exists any public need for the proposed operation.

VI

I.C.X. maintains a large sales force backed up by a staff of sales secretaries and customer service personnel for the purpose of soliciting general commodities. Particularly it employs a sales executive whose primary duty is the solicitation of government traffic on a nation-wide basis. A considerable amount of money has been invested in the facilities owned and operated by I.C.X. to serve the shipping public, and much of our equipment and facilities are not being used to capacity today.

VII

In Docket No. MC-F 9659, I.C.X. is the vendee, seeking to purchase the interstate authority for the transportation of general commodities, including Class A and B explosives, of Arizona Utah Express, Inc.. between Salt Lake City, Utah, and Phoenix, Arizona, tacking at Flagstaff. Prescott and Wickenburg with I.C.X's existing authority. Division Three has upheld the findings of the hearing examined, who recommended approval of the transaction.

In Docket No. MC-F 9994, I.C.X. is the vendee, seeking to acquire the interstate operating rights for the transportation of general commodities of California Motor Transport Co., Inc. In January, 1969, I.C.X. was granted temporary authority to conduct operations under the interstate operating rights of California Motor Transport Co. and is doing so at the present time. The California Motor Transport Co. authority joins the I.C.X. authority at Los Angeles, California. These authorities are portrayed on the attached map.

VIII

Inspection of the application form used by the applicant shows that applicant, by its president, Wesley S. Johnson, alleges that there is attached to the application a "letter or letters indicating shipper support, with detailed information as follows:

(a) Accurate description of commodity. quantity and frequency of shipments to move, and consequences of denial of this application.

(b) Statement that there is a carrier service available (rail or motor), either single line or by interline, between the points involved. If any service is available, indicate to what extent it has been used, what effort has been made to utilize it, whether carriers with authority have refused to furnish service, the manner and extent that existing services, if any, are inadequate, and detailed reasons as to why additional services are needed. If shipper's support is based on alleged failure of existing carriers to provide service, names and addresses of such carriers must be furnished.

(c) Shipper has not supported a prior application by applicant herein or any other person seeking authority to perform the service here proposed."

There is no letter attached to the application which contains information responsive to the statement quoted above!

There is, however, a letter attached which has been submitted by the Department of the Army but it fails to supply the necessary information. The quoted requirements are not permissive; they are mandatory. All applicants must furnish a letter of support which meets the above requirements before authority can be properly granted. The letter submitted by the Department of the

Army is so vague that it actually states the very reason why the sought authority should not be granted. The shipper says: "The services of this company have afforded the Department of Defense a meaningful measure, under practical conditions, of carrier capability in general. The shorter service is necessary as both a measure and a participant in 'shortening the pipeline.' A sound adequate transportation system is essential to the national defense. Accordingly, the military establishment supports as many carriers and routes as can be supported by the economy."

The Commission demands specificity of applicants and their supporting shippers but gets vague generalities. This cannot be condoned by a grant of authority. The "military establishment" must not be given carte blanche power to demand and receive "as many diverse carriers and routes as can be supported by the economy." Such a policy would be in direct contravention of the mandate of Congress as set forth in the National Transportation Policy.

I.C.X. will be the first to admit that the "military establishment" must have pipelines to move its vital military supplies, but at the same time, the "economy" must not be so burdened by unnecessary grants of authority that the entire regulated transportation industry is crushed.

I.C.X. met, without problems, the demands of the Department of Defense and the various branches of the U.S. Government in transporting billions of tons of various commodities. including Class A and B explosives, during national crises of World War II, Korean Police Action, Cuban Conflict, and all other local, national and world-wide situations.

VIII

Protestant feels it is imperative that the Commission deny the application in its entirety for two very important

reasons: The first is that the Commission must refuse to allow the "military establishment" to acquire a surplusage of carriers on such shallow justification as that tendered by the Department of Defense. To do otherwise would be to set a very dangerous precedent. The second reason is that the applicant must not be rewarded with such broad authority after having been a willing violator of the Commission's rules and regulations and a violator of the laws administered by the Commission. In Docket No. MC-C 5835 an investigation was instituted into the practices of the applicant and it has been found that American Farm Lines willfully violated the laws of the United States District Court for the Western District of Oklahoma (No. 67-487 Civil) enjoining the applicant from performing the same illegal carriage.

IX

I.C.X. respectfully urges the finding that there has been no showing by the applicant that the conditions and standards have been met which would justify the grant of authority requested. I.C.X. affirmatively denies that there is any need which cannot be met by existing carriers if given an opportunity.

I hereby certify that a copy of this protest has been mailed to the applicant's representative by first class mail, properly addressed and postage prepaid, on June 11, 1968.

ROGER SOLLENBARGER
Roger Sollenbarger
Counsel—Commerce

BEFORE THE

INTERSTATE COMMERCE COMMISSION

AMERICAN FARM LINES

MC-129908 TA

Protest of Merchants Fast Motor Lines, Inc.

To the Interstate Commerce Commission:

Merchants Fast Motor Lines, Inc. opposes the granting of the above captioned application, and in support thereof would show the following:

Statement of the Case

By application filed May 17, 1968, published at page 7796 of the Tuesday May 28, 1968 issue of the *Federal Register,* American Farm Lines, herein referred to as applicant, seeks authority to operate as a common carrier, by motor vehicle, over irregular routes, in the transportation of general commodities including classes A and B explosives, restricted to traffic moving on Government Bill of Lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and on the other, point in Washington, California, Nevada, and Arizona, for 180 days. The application is supported by the Department of the Army, Office of Judge Advocate General.

Preliminary

The applicant herein has conducted operations in the past under the contention that it is an agricultural cooperative association operating under an exemption afforded by law. Evidently, the applicant did not conduct its operations as a bona fide agricultural cooperative association as a United States District Court of the Western District of Oklahoma has issued a permanent injunction

against the applicant, its general manager and director, restraining them from conducting for-hire transportation operations in interstate or foreign commerce of any products not owned by one of the applicant's qualified members. In a companion proceeding, the applicant and its representatives were permanently enjoined from transporting explosives for the United States Government in connection with movement of nonexempt nonmember traffic. Obviously, the issuing of the permanent injunctions has precipitated the filing of the instant application. It is respectfully submitted that the issuance of a permanent injunction restraining a carrier from violating the law forms no basis for the granting of temporary authority.

Interest of Protestant

Merchants Fast Motor Lines, Inc., herein referred to as Merchants or protestant, is a motor common carrier of general commodities, with the usual exception, operating over numerous regular routes in the State of Texas, handling traffic directly between points on its own line and by interchange with other motor common carriers at common termini for the handling of traffic moving to, from, and through points on its own routes, on the one hand, and, on the other, points generally in the United States. Its operations are by virtue of Certificate MC-2228 and subs thereto, and generally are between Dallas and Forth Worth on the east; Houston and Beaumont on the southeast; Wichita Falls and Amarillo on the north; Lubbock, El Paso and San Antonio on the west; serving directly approvimately 350 points in the State of Texas. It operates in excess of 284 tractors, 223 straight trucks, and 518 trailers. It maintains station and terminal facilities at the principal points on and along its routes, including Abilene, Amarillo, Andrews, Bay City, Baytown, Beaumont, Big Spring, Brady, Breckenridge, Brownfield, Brownwood, Coleman, Colorado City, Comanche, Conroe, Dallas, Dublin, Eastland,

El Campo, El Paso, Forth Worth, Freeport, Gatesville, Hamlin, Hereford, Houston, Lamesa, Llano, Lubbock, Midland, Mineral Wells, Monahans, Odessa, Pampa, Pecos, Perryton, Post, Rotan, San Angelo, San Antonio, San Saba, Seagraves, Snyder, Spur, Stamford, Stephenville, Sweetwater, Waco, Weatherford, and Wichita Falls. It is not operating at full capacity, but has the ability to transport additional freight tonnage, including freight tonnage of the type covered by this application.

Merchants opposes this application insofar as authority is sought to transport general commodities and Classes A and B explosives moving on Government bills of lading between points in Texas, on the one hand, and, on the other, points in Washington, California, Nevada, and Arizona. Merchants is presently handling shipments of the involved commodities which move on Government bills of lading moving between the aforementioned States in interchange service in connection with various other common carrier motor carriers such as T.I.M.E. Freight, Inc., Western Gillette, Inc., Albuquerque-Phoenix Express, Inc., Illinois-California Express, Inc., Consolidated Copperstate Lines, Navajo Freight Lines, Inc., and Consolidated Freightways, Inc. This type of traffic is extremely important to protestant, and a granting of this application would place a carrier in the field authorized to perform operations in single-line service in competition with Merchants' existing joint-line service.

Grounds for Denial of Application

THE ISSUANCE OF A PERMANENT INJUNCTION RESTRAINING A CARRIER FROM VIOLATING THE PROVISIONS OF THE INTERSTATE COMMERCE ACT FORMS NO BASIS FOR THE GRANTING OF TEMPORARY AUTHORITY.

Brief and Argument

The grounds for the granting of temporary authority are clear and well defined, to wit, "An immediate and

urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service." 49 CFR § 1131.4(b)(2). The Commission's rules and regulations formulated for the handling of temporary authority applications list several ways in which "an immediate and urgent need" can be established: "a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed." 49 CFR § 1131.4(b)(2). Of these methods, the applicant here is probably relying upon "a discontinuance of existing service." Protestant respectfully submits that this ground is not applicable to the instant application.

A federal district judge has determined that applicant was conducting operations without appropriate authority from the Interstate Commerce Commission under the guise of an exempt agricultural cooperative association. The court's order in this respect is final and appealable. Protestant has no information as to whether or not the applicant here will appeal the court's order issuing the permanent injunctions. It is readily apparent, therefore, that applicant is attempting to use the vehicle of a temporary authority application to immediately reinstitute operations which the federal district court has held to be unlawful. The "service" provided by applicant under the guise of an agricultural cooperative association is not a service that can be considered as forming a basis for the granting of the authority requested herein. To the contrary, these prior operations should be held against the applicant as constituting evidence of unfitness to provide the requested service.

In any event, Merchants along with its connecting-line carriers are presently equipped and stand ready, willing, and able to provide any service for the handling of the involved commodities that may arise. The rule is well-established and codified in the Commission's temporary authority rules and regulations that the desire of a shipper for single-line service in lieu of existing interchange or connecting carrier service will not warrant a grant of authority, be it temporary or permanent. See *Pine Tree Transport, Inc., Ext.-Frozen and Canned Fruits,* 54 MCC 669, 674-675 (Ent. Comm. 1952), and 49 CFR § 1131.4(b)(4). In order for applicant to receive a grant of temporary authority herein, it must "clearly establish" that Merchants and its connecting-line carriers are not capable of, or have failed in, meeting the "reasonable immediate and urgent needs of the shippers or receivers between the points or territories and in respect of the commodity or commodities in volved." 49 CFR § 1131.4(b)(4). Merchants knows of no complaint in its service and knows of no reason why it cannot meet the "reasonable immediate and urgent needs" of the Department of the Army, Office of Judge Advocate General. Clearly, applicant has failed to sustain its statutory burden of proof as well as the burden of proof imposed upon it by the Commission's rules and regulations. Accordingly, the application must be denied.

If there is indeed a genuine need for the service proposed, then let applicant make its case at an oral hearing on a permanent application. The temporary authority provisions of the Interstate Commerce Act were not intended to be invoked indiscriminately by carriers, such as applicant attempts to do here. To the contrary, section 210a(a) of the Act is designed to meet a very particular and isolated situation, and enables the Commission to grant authority without hearing or other proceeding so as to enable the provision of service for which there is "an immediate and urgent need to a point or points or within a territory having no carrier service capable

of meeting such need." The provisions of the statute are twofold, and the applicant's burden is twofold, in that a need must first be established and then it must be shown that existing carriers cannot meet that need. Here, applicant has failed on both counts. Its obvious reliance upon operations conducted in the past under the guise of an agricultural cooperative association is not evidence of an immediate and urgent need for the service proposed here. Furthermore, applicant has failed to show that the territory it seeks to serve is without carrier service capable of transporting the involved commodities, and Merchants has affirmatively shown that its service is available and that it is capable of transporting the involved commodities. Under these circumstances, the authority sought here must be denied and applicant relegated to the filing and prosecution of a permanent authority application if it desires to do so.

Conclusion

WHEREFORE, Merchants Fast Motor Lines, Inc. prays that the application of American Farm Lines, MC-129908 TA, be denied insofar as authority is sought to operate between Texas, on the one hand. and, on the other, Washington, California, Nevada, and Arizona, and for such other and further relief to which it may show itself to be entitled.

Respectfully submitted,

REAGAN SAYERS
CLAYTE BINION
RAWLINGS, SAYERS & SCURLOCK

Century Life Building
P.O. Box 17007
Forth Worth, Texas 76102

Attorneys for Merchants Fast Motor Lines, Inc., Protestant

Due Date: June 12, 1968

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET No. MC-129908 TA

IN THE MATTER OF: AMERICAN FARM LINES

Protest

Comes now MIDWEST EMERY FREIGHT SYSTEM, INC., (MIDWEST EMERY) and LITTLE AUDREY'S TRANSPORTATION COMPANY, INC., (LITTLE AUDREY), protestants, and file this their protest to the above-captioned application.

Each protestant hereunder is actively engaged in the performance of service in interstate commerce, by motor vehicle, pursuant to certificated authority issued to it by the Interstate Commerce Commission. MIDWEST EMERY is a motor common carrier of general and specialized commodities, primarily perishables, operating pursuant to authority issued in Docket No. MC-114019 and various subs thereunder. Attached hereto and designated Appendix "A" is a summary of the operating authority issued to MIDWEST EMERY by the Interstate Commerce Commission. As pertinent to the instant application, MIDWEST EMERY is authorized to transport foodstuffs, raw and manufactured, between all points in Indiana and Illinois among other states, pursuant to Item 34 in its Sub-No. 38 Certificate (Appendix A, p. 4). Further, on page 28 of Appendix A, under paragraph 180 (Sub-No. 94), MIDWEST EMERY is authorized to transport general commodities, with the usual exceptions, from Chicago, Illinois, and points in the commercial zone thereof, to Denver, Colorado. At Denver, MIDWEST EMERY has inter-line arrangements with several carriers, such as Navajo Freight Lines, Ringsby Truck Lines, and Garrett Freight Lines, under which lading would be handled in through trailer inter-line service to the western states sought in the instant application.

LITTLE AUDREY'S is a motor common carrier primarily of specialized commodities, operating pursuant to authority

issued to it by the Interstate Commerce Commission in No. MC-108053 and various subs therunder. Attached hereto and designated Appendix B is a summary of the operating authority issued to LITTLE AUDREY'S by the Interstate Commerce Commission. As relevant to the instant proceeding, LITTLE AUDREY'S is authorized to operate between all or specialized points and areas in Indiana, Illinois, Missouri, Oklahoma and Kansas on the one hand, and, on the other, all or specified points or areas in Washington, California, Nevada and Arizona. For example, pursuant to its Sub-Nos. 6, 10 and 18 authorities, LITTLE AUDREY'S is authorized to transport meats, meat products, meat by-products, and articles distributed by meat packing houses, from points in Illinois, Missouri, Oklahoma and Kansas to points in Washington, California, Nevada and Arizona. Under its Sub-No. 24 authority, LITTLE AUDREY'S is authorized to transport frozen foods from Lafayette, Indiana, to all points in California. Under the authority set forth in its title and Sub-No. 14, 27 and 31 operating rights, LITTLE AUDREY'S is authorized to transport a wide variety of food items from all or specified points in the involved western states to points, collectively, in Texas, Kansas, Illinois, Indiana and Missouri.

It is clear from an examination of the operating rights of protestants herein, as reflected in Appendices A and B, that these carriers can provide a substantial portion of the transportation service sought in the instant application.

Terminal facilities are maintained by each of the protestants herein within the territory sought to be served by applicants, and suitable and sufficient equipment is available for the performance of such service as may be required by the shipping public within the territory. Specifically, MIDWEST EMERY maintains complete terminal facilities at specified points in Illinois, Indiana and Kansas, as pertinent to the instant application, and as reflected in Appendix C attached hereto. Appendix D reflects the terminal facilities maintained throughout its system by

Little Audrey's, including facilities at points in Illinois, Kansas, California and Washington. In addition, as reflected on this appendix, Little Audrey's maintains check points at sites in Nevada, California, Arizona, and Washington.

MIDWEST EMERY operates a total of 806 tractors, 1,094 trailers of various types and capacities, and 831 mechanically refrigerated units, all as more specifically described on Appendix E hereto. Appendix F reflects the equipment operated by LITTLE AUDREY'S and indicates a total 25 tractors and 26 insulated refrigerator semi-trailers in the fleet of this carrier.

It is difficult to be specific with respect to a precise scope of the service provided by each protestant herein that would conflict with the instant proposed service, in light of the fact that the statements filed in support of the subject application are couched in the most vague and general of terms. However, MIDWEST EMERY constantly solicits traffic within the scope of the instant application to the extent of its authority, and has participated in the movement of some LTL lading to this extent. Likewise, LITTLE AUDREY'S constantly solicits business within the scope of its operating rights, and at present is handling volume meat shipments from its authorized origin, as reflected in Appendix B, to points in Washington and California. These shipments move to points in the western states for further overseas movement as well as directly to military installations in these states, even though such shipments are not handled on government bills of lading.

Protestants herein are ready, willing and able to perform reliable and expeditious transportation services for the movement of both LTL and truckload shipments with their existing equipment, facilities and highly trained staff within the scope of their operating authorities. If additional equipment is required, these carriers are in a position to and would furnish such needed and additional equipment

to accommodate any increase in any shipper's volume of traffic.

Irregardless of the service shown to be presently available from MIDWEST EMERY and LITTLE AUDREY'S, however, it is respectfully submitted that the instant application for temporary authority should be denied for the reason that the applicant has failed to comply with the very specific requirements set forth in said application (B.O.R. 95) for certain information as a condition precedent to a consideration of the request for such authority. Specifically, Item 10 of the application form for temporary authority requires that the supporting shipper's statement provide the names and addresses of existing carriers who have either failed or refused to provide for service alleged to be needed, and the reasons for any such failure or refusal. Here, the supporting statement filed by the Department of the Army (dated May 5, 968) makes no statement whatsoever with respect to available service in the affected territory and the extent, if any, to which such service has been utilized, or attempted to be utilized, and found wanting in any material respect. Without the required information, it is impossible for the Commission to determine whether "an immediate and urgent need" exists for the proposed service.

Further, while applicant is seeking to transport virtually all commodities, there is nothing in the statements of either applicant or the supporting shipper to indicate in even the most general manner the nature of the particular commodities sought to be transported. Without identifying a representative number of particular items sought to be transported, the request for enormously broad commodity authority represented by the instant application cannot be supported by any of the statements filed in connection therewith. It would actually appear, from an examination of these statements, that the only items of interest to the supporting shipper would be "military sup-

plies" consisting of Class A and Class B explosives (See, e.g., p. 1 shipper statement).

Further, protestants herein are prejudiced by applicant's failure to provide the required information with respect to the origins and destinations of any of the traffic involved in the instant application. In applications for temporary authority seeking to serve a territory rather than a point or points, evidence supporting the "immediate and urgent need" for service to enough specific points to warrant the requested territorial grant is required. Here, however, while statewide authority is sought between points in approximately thirteen states, not one specific origin or destination is identified, and, as noted above, the nature of the involved traffic is not disclosed with respect to an identification of the particular commodities.

These material gaps in applicant's presentation must act to defeat its proposal. Nowhere on the instant record are the circumstances which create "an immediate and urgent need" for the requested service disclosed. All we are told is that applicant had been providing service for the shipper pursuant to the agricultural cooperative "exemption" set forth in the Interstate Commerce Act, which service ceased as a result of recent court action in which the applicant had been found to be engaging in for-hire transportation service without appropriate operating authority (*Munitions Carriers Conference, et al.* v. *American Farm Lines, et al.*, No. 67-487 Civil, U. S. D. C., W. D. Oklahoma, February 20, 1968). Certainly, the continuance of applicant's service prompted the supporting shipper to file the instant statement requesting that applicant be granted temporary authority to continue this service. This desire, without more, hardly satisfies the Commission's rules and regulations, to the extent noted above, with respect to the issuance of temporary authority. Certainly, past operations standing alone, and without any indication of the extent to which existing service in the area has been utilized

if at all, do not constitute "an immediate and urgent need" for the continuance of such service which would warrant a grant of temporary authority, especially when such past operations were illegal as in the instant proceeding. Further, there is nothing peculiar or unique about the handling of traffic moving on government bills of lading that constitutes a peculiar service factor not available from existing carriers, such as protestants herein, in the affected territory.

WHEREFORE, protestants MIDWEST EMERY and LITTLE AUDREY'S pray that the subject application for temporary authority be denied in its entirety for the reasons stated above.

Respectfully submitted,

MIDWEST EMERY FREIGHT SYSTEM, INC.
LITTLE AUDREY'S TRANSPORTATION COMPANY, INC.
Protestants

By DAVID I. HARFELD
David I. Harfeld,
Attorney for Protestants

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C.

DOCKET No. MC 129908TA

IN THE MATTER OF THE APPLICATION OF

AMERICAN FARM LINES,
AMERICAN FARM LINES, 641 North Meridian,
Oklahoma City, Oklahoma 73107

Protest of Navajo Freight Lines, Inc.

Comes now Navajo Freight Lines, Inc., hereinafter referred to as Navajo, operating under Certificate of Public Convenience and Necessity No. MC 76032 and related subs,

of 1205 South Platte River Drive, Denver, Colorado, 80223 and enters its Protest to the above application notice of which appeared in the Federal Register of Tuesday, May 28, 1968 at Page 7796 and in support thereof states:

1. That Applicant seeks authority to operate as a common carrier by motor vehicle over irregular routes transporting:

> General commodities, including Classes A and B explosives, restricted to traffic moving on government bill of lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and on the other, points in Washington, California, Nevada, and Arizona for 180 days.

2. Attached hereto as Exhibit A is an abstract of the authorities issued to Navajo by the Interstate Commerce Commission. For convenience of reference, arbitrary route numbers have been added, and the following routes are in conflict with the instant application:

Arizona—2, 3, 28, 33, 43, 44, 69, 72, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 116, 117, 128, 140.

California—2, 4, 21, 45, 125, 146, 147, 151.

Illinois—15, 24, 25, 41, 146, 150, 157.

Indiana—41, 42, 144.

Kansas—15, 58, 59, 60, 61, 62, 63, 74, 75, 76, 78, 121, 134, 138.

Missouri—15, 24, 32, 75, 78, 133, 134, 135, 136, 137, 141, 150.

Nevada—28, 86, 87.

Oklahoma—56, 58, 61, 71, 79, 139.

Texas—5, 6, 23, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 62, 64, 80, 96, 97, 99, 110, 122, 123, 141.

In addition to the foregoing regular route, irregular route and alternate route authorities, the following specific explosives authorities are pertinent to this Protest: routes 16, 17, 99, 103. So as to graphically illustrate the various general commodities authorities of Navajo and their explosives authority as well, there is attached hereto as Exhibit B and incorporated herein by reference a map showing the routes and operations of Navajo Freight Lines, Inc. as well as the locations of the various government installations in the affected states (including Department of Defense installations) to which Navajo provides either direct or interline service.

3. Protestant operates a modern well maintained fleet in excess of 2,400 units stationed throughout its authorized territory, most of which is suitable for the type of traffic proposed in the instant application. Further, this fleet is not being fully utilized at the present time, and Protestant is financially able to acquire additional equipment to meet the needs of the shipping public, including the Department of Defense.

4. Section 210a (a) of the Interstate Commerce Act states, in part, as follows:

> "To enable a provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need the Commission may . . . grant temporary authority for such service by a common carrier."

Pursuant to that statutory authority, the Commission in its regulations Part 1131.4 (b) (2) has stated "An immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service." Navajo is a party to virtually

hundreds of routings in connection with other authorized common carriers providing dependable through transportation services to and from all government installations within the states named above. In addition, Navajo is a party to the National Equipment Interchange Agreement. In order to demonstrate the extent of interest in this traffic and to further demonstrate that there is available to the Department of Defense a wide variety of routings with numerous concurring authorized carriers between these points, there is attached hereto as Exhibit C a copy of Rocky Mountain Motor Tariff Bureau, Inc., Agent, U. S. Government Quotation No. 16, which is currently in force. Examination of this rather voluminous document will reveal that Navajo, which is identified therein as Carrier No. N1800, or in certain instances N180, is a participant in many of these routes which are too numerous for specific mention. Such traffic as Navajo is currently handling for the Department of Defense between the involved points constitutes a significant part of the revenues upon which Navajo is dependent to maintain the level of service which it is able to offer to the shipping public.

5. Applicant's application and the supporting statements submitted by the Department of the Army, are fatally defective and fail to conform to the statutory requirements cited above. Specifically, there is no claim of an immediate and urgent need and no claim that there is a lack of carrier service capable of meeting whatever need exists. The Department of the Army letter indicates that since February 20, 1968 American Farm Lines, Inc. has been required by the U. S. District Court injunction to turn down more than 700 truckloads of Department of Defense traffic. There is no contention, however, that the Department of Defense has had any difficulty in finding other carriers to transport these 700 truckloads. This deficiency is not the result of mere oversight. There is attached hereto as Exhibit D a copy of a letter from the Department of the Army to Mr. Howard McCormack,

General Manager, American Farm Lines Coop dated 30 April 1968 wherein it is stated "However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines".

6. Protestant further questions the fitness of the Applicant to receive from this Commission operating authority. The supporting statement of the Department of Defense indicates that prior to February 20, 1968 Applicant was transporting more than 300 truckloads of freight per month for the U. S. Government without appropriate authority from this Commission. The United States District Court for the Western District of Oklahoma in Civil Action No. 67-487 has found that such transportation was in fact without authority from the Interstate Commerce Commission and was conducted in violation of the law. The Commission on its own motion has instituted an investigation into the operations and practices of the Applicant in Docket No. MC-C-5835. Under such circumstances and conditions, no operating authority should be issued to the Applicant pending the final determination of the issues in the above noted proceeding.

Wherefore, Protestant respectfully prays that the application be denied.

Respectfully submitted,

NAVAJO FREIGHT LINES, INC.

By WILLIAM E. KENWORTHY
William E. Kenworthy
Counsel

P.I.E
PACIFIC INTERMOUNTAIN EXPRESS
1417 CLAY STREET
P.O. BOX 958
OAKLAND, CALIF. 94604
TEL. (AREA CODE 415) 452-1616

June 7, 1968

Mr. C. L. Phillips
District Supervisor
Interstate Commerce Commission
Bureau of Operations
Room 350, American General Building
210 Northwest Sixth
Oklahoma City, Oklahoma 73102

Re: Docket No. MC-129908 TA, American Farm Lines
General Commodities Including Classes A and
B Explosives

Dear Mr. Phillips:

Pacific Intermountain Express Co., a Nevada corporation, with its home office at 1417 Clay Street, Oakland, California 94604, protests the above-referenced application filed by American Farm Lines seeking temporary authority as a common carrier to transport over irregular routes general commodities, including Classes A and B explosives, moving on government bills of lading, between points in Kentucky, Indiana, Illniois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Arizona and Utah, for 180 days, and in support of its protest respectfully shows:

1. That protestant is authorized in Docket No. MC-730 and numerous sub numbers thereto to transport, primarily over regular routes, general commodities with certain ex-

ceptions between numerous points in Kentucky, Indiana, Illinois, Missouri, and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, and Utah. It is authorized to transport Classes A and B explosives over regular routes and, to a lesser extent, over irregular routes in the states of Indiana (Chicago, Illinois Commercial Zone points), Illinois, Iowa, Nebraska, Missouri, Kansas, Colorado, Wyoming, Utah, Idaho, Washington, California, and Nevada. In addition, it is authorized to transport liquid chemicals in bulk between points in Texas, on the one hand, and, on the other, points in the eleven western states, including Washington, California, Nevada, Arizona, and Utah. Regular daily interline service, including through trailer interchange, is maintained with several hundred reliable connecting motor common carriers at P-I-E terminal points whereby joint-line service is available to the public and to the Department of Defense for the transportation of general commodities, including Classes A and B explosives, between *all points* in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas on the one hand, and, on the other, *all points* in Washington, California, Nevada, Arizona, and Utah.

2. Protestant owns and operates in excess of 6,000 vehicles of all kinds and types required for the movement of general commodities, including Classes A and B explosives, and for the movement of bulk liquid chemicals. It maintains terminals in Kentucky, Indiana, Illinois, Missouri, Texas, Kansas, Washington, California, Nevada, and Utah. Each terminal is equipped, maintained, and staffed to assure an efficient service to the public, and to provide dispatching and supervisory control over protestant's operations both local and line haul.

3. Protestant has provided and is providing service to the supporting shipper on a regular daily basis for the transportation of general commodities, including Classes A and B explosives. It believes, and therefore alleges,

that all requests for service in the movement of U.S. Government shipments have been complied with in a reasonably satisfactory manner.

4. The service of protestant is offered to the supporting shipper by direct solicitation at Military Traffic Management and Terminal Service (MTMTS) headquarters in Washington, D. C., and at regional MTMTS offices. Representatives of protestant also maintain regular contacts on military installations and General Services Administration offices located from coast to coast. In addition, protestant offers its service through local and national advertising media; by tariffs lawfully on file with the Commission; by special rate quotation publications furnished the U. S. Government pursuant to Section 22, Part 1, of the Interstate Commerce Act; and by periodically furnishing U. S. Government offices, including MTMTS headquarters in Washington, D. C., a complete file showing the facilities of protestant available to and offered to the supporting shipper. Protestant desires and needs additional traffic in the involved territory and will increase its vehicular and terminal facilities as traffic demands may require.

Background of Applicant

Applicant, an Oklahoma corporation, has purportedly been in business as a farm cooperative somewhat in excess of three years. It has reportedly provided transportation for nine companies, which also appear to be cooperatives, listed as follows:

1. California Canners and Growers, San Francisco, Calif.
2. MFA Co-Op, Columbia, Missouri
3. Nebraska - Iowa Non Stock Cooperative
4. Neosho Valley Creamery Co-op, Erie, Kansas
5. Producer's Creamery, Chillicothe, Mo.

6. Producer's Creamery, Springfield, Mo.

7. Southwest Milk Producers, Texas

8. Tri Valley Growers, Stockton, Calif.

9. North Texas Producers, Texas

The total transportation provided by applicant for the above-named cooperative for the year 1965 amounted to $554,168.73, for the year 1966, $683,445.12, and for the year 1967, $1,418,289.67. Its transportation for other undisclosed persons or firms for the same years amounted to, for 1965, $516,508.71, for 1966, $633,438.99, and for 1967, $886,847.19. In addition, during 1967 applicant derived total revenues amounting to $1,321,645.70 for U. S. Government transportation. Applicant's transportation for other than the group of cooperatives thereby increased from $516,508 in 1965 to $2,208,492 in 1967. Percentage-wise the non-cooperative transportation during the same period increased from 48 per cent to 60 per cent of applicant's gross revenues.

Applicant has indicated its operations have been conducted under the exemption provisions of Section 203 (b) (5), Part II of the I. C. Act. Such exemption relates to cooperative associations as defined by the Agricultural Marketing Act, 12 U.S.C. 1141, reading in part as follows:

"(a) As used in this subchapter, the term 'cooperative association' means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services: Provided, however, that such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform to one or both of the following requiremnts. First: That no member

of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and

Second: That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third: That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association."

The United States District Court for the Western District of Oklahoma in *Munitions Carriers Conference, Inc. et al v. American Farm Lines et al,* No. 67-487 Civil, January 26, 1968, ruled that the round trip (back to back) movements of U. S. Government shipments by American Farm Lines was beyond the exemption provisions and therefore unlawful. A permanent injunction subsequently issued February 20, 1960. The Interstate Commerce Commission, Bureau of Enforcement, intervened in that proceeding through its Fort Worth, Texas regional counsel. The above-quoted transportation revenues of applicant are from the court records in the 67-487 proceeding. Official and judicial notice is hereby requested of that court record.

Applicant continued its transportation of U. S. Government shipments but on a one-way-haul and return-empty-movement-of-vehicle basis. The same U. S. District Court in No. 68-148 Civil, found such transportation unlawful, and again granted a permanent injunction May 20, 1968.

Your Commission has, on its own initiative, in Docket No. MC-C-5835, *American Farm Lines et al, Investigation of Operations and Practices,* instituted a complaint proceeding with the applicant herein as respondent. Hearing thereon, assigned at Oklahoma City May 13, 1968, was postponed pursuant to a request by counsel for respondent.

Support For Temporary Authority

By notice published in Federal Register, Volume 33, No. 104, May 28, 1968 at Page 7796, the supporting shipper is designated as "Department of the Army, Office of Judge Advocate General, Washington, D. C." The supporting letter dated May 15, 1968 over the signature of Curtis L. Wagner, Jr., Chief, Regulatory Law Division, fails in all material respects in meeting the stringent requirements under Section 210(a)(a) Part II of the I.C. Act. The letter seemingly ignores the minimum supporting statement requirements of Ex Parte MC-67, *Special Procedures for Motor Temporary Authority,* (98 MCC 483 at pages 486-487), which specify as follows:

"Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested).

(3) Volume of traffic involved, frequency of movement and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's docket number, if known, and state whether such application was granted or denied and the date of such action, if known."

Argument

It is submitted that the Commission should summarily reject the application for non-compliance with its own rules and regulations.

The rules prescribed in Ex Parte 67 are procedural rules. The Courts have universally and consistently ruled that procedural rules are binding upon the parties to which they apply and also upon the administrators who issue them. *Service* v. *Dulles*, 354 U.S. 363, 372, 388-389; *Arcardi v. Shaughnessy*, 347 U.S. 260, 265; *Bridges* v.

Wixon, 326 U.S. 135, 163, and *Coleman* v. *Brucker*, 257 Fed. 2d. 661, where at page 662 it was held:

> "• • • And in *Service* v. *Dulles*, 1957, 354 U.S. 363, 372, 77 S. Ct. 1152, 1 L. Ed. 2d. 1403, the Court sustained Service's contention 'that the Secretary's action is subject to attack under the principles established by this Court's decision in United States ex rel *Arcardi* v. *Shaughnessy*, 374 U.S. 260 (74 S. Ct. 499, 98 L. Ed. 681), namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature.' "

Likewise, in *Atwood's Transport Lines, Inc.* v. *U. S.*, 211 Fed. Supp. 168, affirmed per curiam, 373 U.S. 377, it was stated that:

> "Rules and regulations promulgated by Governmental establishments pursuant to statutory authority have the force and effect of law, and concededly are subject to same tests as statutes. • • •"

See also *Arcardi* v. *Shaughnessy, supra*, and *Boynton* v. *Pedrick*, 136 Fed. Supp. 888, at page 890.

It is readily apparent that Ex Parte 67 does not merely direct shippers as to what they should include in their statements. The language is definite and emphatic that a shipper statement must contain at least this information. This required information represents therefore the minimum which shippers must supply. Failure to provide this information denies the Commission the necessary facts upon which it must predicate its decision. It has direct relation to the applicable statute, Section 210(a)(a) of the Act, which provides:

> "To enable the provision of service for which there is an *immediate and urgent need* to a point or points

or within a territory having no carrier service capable of meeting such need, the Commission *may, in its discretion and* without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be." (Emphasis added)

Insofar as this proceeding is concerned, this statutory provision contains two important requiremnts, namely, (1) the specification of applicant's required burden of proof and (2) the Commission's discretionary power to act once this burden has been met. Therefore, it is imperative that any applicant seeking temporary authority must first demonstrate an immediate and urgent need for the proposed operation to a point or points or within a territory having no carrier service capable of meeting such need.

The facts surrounding the events leading up to the instant application compel a conclusion that applicant has been operating in interstate commerce as a common carrier by motor vehicle without benefit of a certificate or permit as required by law and has been operating outside the statutory exemption. Such has been the findings in a United States District Court in the several proceedings heretofore cited. Applicant is named as a respondent in an investigation proceeding before your Commission now awaiting hearing. Applicant has been aided substantially in its operations, found to be unlawful, by the supporting shipper. That same shipper now would have the applicant rewarded for having disregarded the statutory guidelines established by 49 USC 303(b)(5) and 12 USC 1141(j), *supra*. The existing circumstances and past activities of American Farm Lines must forceably advance the question of applicant's fitness to receive a grant by your Commission of any authority.

Conclusion

Applicant, having failed to establish an immediate and urgent need for service which existing rail and motor carriers are unable or unwilling to provide, must have its application denied.

Wherefore protestant requests that the application be denied on the basis that (1) an immediate and urgent need has not been demonstrated, (2) that the minimum statutory requirements as specified by the applicable statute and rules and regulations thereunder have not been satisfied, and (3) that applicant is not shown to be fit to be granted the authority sought.

Respectfully submitted,

PACIFIC INTERMOUNTAIN EXPRESS CO.
EARL J. BROOKS
Earl J. Brooks
Director of Commerce

Earl J. Brooks
P. O. Box 958
Oakland, Calif. 94604

RED BALL MOTOR FREIGHT, INC.
3177 IRVING BOULEVARD P. O. BOX 47407
DALLAS, TEXAS 75247
OFFICE OF THE GENERAL COUNSEL

June 10, 1968

Mr. C. L. Phillips
District Supervisor
Interstate Commerce Commission
Bureau of Operations
Room 350, American General Building
210 N.W. Sixth Street
Oklahoma City, Oklahoma 73102

Re: Docket MC-129908 TA
American Farm Lines
641 North Meridian
Oklahoma City, Oklahoma
Federal Register May 28, 1968,
at Page 7796; and republished
Federal Register of June 8, 1968,
at Page 8523

Dear Mr. Phillips:

This is the protest of Red Ball Motor Freight, Inc., herein called Red Ball, to the above-captioned application which was published in the Federal Register under date of May 28, 1968, at page 7796.

Scope of the Application

By the instant application, authority is sought to operate as a common carrier, by motor vehicle, over irregular routes, transporting *general commodities, including classes A and B explosives,* restricted to traffic moving on Government Bills of Lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Utah and Arizona, for a period of 180 days.

The Interest and Operations of Red Ball

Red Ball is a motor common carrier of general commodities, with the usual exceptions, operating a daily service over regular routes in the states of Colorado, New Mexico, Texas, Oklahoma, Louisiana, Arkansas, Missouri, Kansas, Tennessee, Mississippi and Alabama. In conducting such operations, Red Ball serves directly 1590 points. It renders a daily service, both scheduled and call and demand, between all the points and places which it is authorized to serve. Such service is conducted pursuant to authority granted to it by the Interstate Commerce Commission under Certificates of Public Convenience and Necessity in MC-2229 and subs thereof. There is attached hereto, and made a part of this protest for all purposes, a multipage brochure entitled "Direct Points of Red Ball Motor Freight, Inc." Included within this brochure is a straight-line map of the operations of Red Ball showing the major cities and towns in its 11,000 miles of certificated operations. There is also listed, alphabetically by state, all of the points which Red Ball serves direct. On the last page of this brochure, there is listed in alphabetical order the more than 90 terminals which Red Ball operates. There is also attached a copy of Red Ball's certificate.

The specific interest of Red Ball in this proceeding is as follows:

Red Ball is at the present time (and has over a long period of time) handling shipments on a daily basis moving on government bills of lading. These movements consist of both general commodities and classes A and B explosives. Red Ball originates traffic at points and places served by it directly in the states of Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, destined to points and places in Washington, California, Nevada, Utah and Arizona. Such traffic, both less truckload, and truckload, is interchanged by Red Ball in Denver, Colorado, one of the major terminals of Red Ball, with Pacific Inter-

mountain Express, Inc., Garrett Freightlines, Inc., Ringsby Truck Lines, Inc., Consolidated Freightways Corporation and D-C International, Inc. In addition to this, Red Ball interchanges traffic which it originates in its area destined to California at Dallas, Texas, with Western Gillette, Inc., Illinois-California Express, Inc., Consolidated Copperstate Lines, Inc. and Braswell Motor Freight Lines, Inc. Additionally Red Ball interchanges traffic which it originates in its area at Amarillo, Texas, destined to the West Coast with Navajo Freight Lines, Inc. and Illinois-California Express. Red Ball also receives, particularly over its Amarillo, Texas, gateway, both general commodities and class A and B explosives originating in Oklahoma destined to the West Coast from Lee Way Motor Freight, Inc., Yellow Transit Freight Lines, Inc. and in Dallas, Texas, it also receives interchange traffic originating at points and places served by Lee Way Motor Freight, Inc., Yellow Transit Freight Lines, Inc. and Texas Oklahoma Express, Inc.

This government traffic, that is, traffic moving on government bills of lading consisting of general commodities and classes A and B explosives, is extremely important traffic to Red Ball. The revenue derived therefrom enables Red Ball to maintain its level of service to the shipping and receiving public, including the United States Government. Any diversion of this traffic and the revenue derived therefrom will have a material effect upon the ability of Red Ball as well as its connecting line carriers to carry on its service to the public generally.

Red Ball operates 671 over-the-road tractors and 1531 over-the-road trailers. Additionally, it operates 696 pick-up and delivery trucks and 65 delivery trailers. The equipment is not being operated at capacity.

There Is No Basis in Law or in Fact for a Grant of Temporary Authority

The application for temporary authority is supported by a letter signed by Curtis A. Wagner, Jr., Chief, Regulatory Law Division of the Department of the Army. The letter from Curtis A. Wagner, Jr. does not state that there is an absence of existing service nor does it allege that there is an inadequacy of service, both of which are jurisdictional requirements for a grant of temporary authority under the specific provisions of the Interstate Commerce Act. The sole issue made by the letter from Curtis A. Wagner, Jr. is that the Department of Defense, and it is assumed the Department of the Army, has in the past used the services of American Farm Lines pursuant to an exemption from economic regulation. It is then pointed out, and correctly so, that recent United States court action has resulted in the stoppage of this service which was being performed by American Farm Lines as an exemption from economic regulation. It is then simply stated that because of this it is the desire of the Department of Defense and the Department of the Army that temporary authority be granted so that American Farm Lines may continue to handle such shipments. Since the time that the injunction was granted by the United States court against the operations of American Farm Lines, the Department of the Army, acting through the statement of Curtis A. Wagner, Jr., alleges that it has had to turn down more than 700 truckloads of materials which would have been transported by American Farm Lines. It makes no allegation, and indeed the Department of the Army can make no such allegation, that such 700 truckloads of traffic was not transported by the existing carriers expeditiously and efficiently.

The statement contained in the application from the president of American Farm Lines is nothing more than a statement to the effect that it has in the past transported

government traffic moving on government bills of lading under a claimed exemption from economic regulation. Since the United States District Court in Oklahoma has enjoined such operation, it now seeks authority, in the form of temporary authority, to move such traffic without there being present the necessary elements in order to justify a grant of temporary authority under the Act. All on earth that American Farm Lines desires to do is to attempt, through a grant of temporary authority, to make legal that which the United States District Court in Oklahoma has declared illegal. There is absolutely no basis under the law, and under the facts submitted, to justify a grant of temporary authority because there is no allegation, and indeed no such allegation could be made, that the existing services and facilities of the existing carriers are in any way inadequate.

Insofar as protestant Red Ball is concerned, the territory here involved is covered by tariffs to which it is a party. These tariffs are the Rocky Mountain Motor Tariff Bureau tariff which publishes in tariff form United States Government quotations, which include published quotations on general commodities, freight of all kinds and classes A and B explosives, showing both origins and destinations and all of the connecting routes. In addition, all carriers, including Red Ball, can, and still do, file individual Section 22 quotations.

The Commission's Special Procedures for Motor Temporary Authority has the effect of statutes under the rules of filing of applications:

> "(c) Supporting statements. Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers . . .". "Any such support-

ing statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested).

(3) Volume of traffic involved, frequency of movement and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail or water cariers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application form permanent or temporary authority covering all or any part of the desired service, give the carrier's docket number, if known, and state whether such application was granted or denied and the date of such action, if known."

It is noted that the above rules or statutes are mandatory and not permissive. Therefore, applicant must accompany its application with supporting statement containing 100% of the above information. Protestant alleges that the applicant has completely failed in this respect. It has not adhered to any of the above rules except a portion of (10) by furnishing the name of the motor carrier who will provide service and is filing application for temporary authority. The allegation of "desirability" certainly does not establish an immediate and urgent need for service which cannot be met by existing carriers. Applicant has not named one single carrier that is not performing the service desired. It cannot do so.

Summary

As has been pointed out previously in this protest, in addition to the services of Red Ball, there are numerous other carriers operating over all or a portion of the territory involved in these proceedings. These carriers, like Red Ball, are general commodity carriers and are daily engaged in the handling of freight having been shipped on government bills of lading. Red Ball is daily engaged in the handling of such traffic and actively solicits such traffic from the Department of the Army and the Department of Defense. It is presently participating in the movement of such traffic and needs to continue in the participation of such traffic in order to insure its financial ability to continue to serve the general public.

Prayer

WHEREFORE, Red Ball Motor Freight, Inc. prays that the application for temporary authority of American Farm Lines be in all things denied.

Respectfully submitted,

CHARLES D. MATHEWS
Charles D. Mathews

Vice President and General Counsel
Red Ball Motor Freight, Inc.
P.O. Box 47407
Dallas, Texas 75247

RISS
Express Service at Freight Rates

C. L. Phillips
District Supervisor
Interstate Commerce Commission
Room 350
American General Building
210 N.W. Sixth
Oklahoma City, Oklahoma 73102

Re: American Farm Lines MC129908TA

Protest of Riss & Company, Inc.

Comes now Riss & Company, Inc., a common carrier by motor and submits this, its protest to the application of the above for temporary authority for 180 days to transport "General Commodities, including Classes A & B Explosives, restricted to traffic moving on government bills of lading between several states in the midwest and points on the west coast."

Riss has its general office in Kansas City, Missouri and holds certificates granted to it by the I.C.C. in Docket No. MC 200 and various subs thereto. The Certificate

is extensive and extends generally from Denver on the west to Boston on the east and Dallas, Texas and Louisville, Kentucky on the south with many certificated routes and points in the area described. Within the whole certificate and area described, Riss can transport general commodities, not including Class A & B Explosives, for the U.S. government. In addition Riss can transport in the Certificate granted by the I.C.C. general commodities, including Class A & B Explosives for the U.S. government in the area included in the triangle between Oklahoma, Kansas, Missouri, Illinois, Iowa, Nebraska and Colorado points. The Riss I.C.C. Certificate is extensive and bulky and consists of 53 pages. Instead of attaching a copy of the Certificate to this Protest, we attach a map of the Riss certificated routes which graphically depicts the part authorizing the transportation of general commodities with exceptions, and in addition shows, marked in red, the routes and authorities wherein Riss is authorized to transport Class A & B Explosives. One copy of the whole entire Riss Certificate is attached to the original copy of this Protest. In the event any parties desire a copy of the entire Certificate, the writer will be pleased to furnish one.

Riss operates approximately 615 closed van trailers owned by the company and in addition are taking delivery of 100 new closed vans from Strick Company at the present time, and beginning this week delivery on 100 new Trailmobile closed van trailers purchased by Riss has started and will be completed in two weeks.

Insofar as pertinent herein Riss maintains terminals at Oklahoma City, Dallas, Texas, Kansas City, Missouri, St. Louis, Missouri, Chicago, Illinois, Joliet, Illinois, Grand Island, Nebraska, Denver, Colorado, Louisville, Kentucky, all of whom are involved in handling the transportation of Class A & B Explosives for the U.S. government.

Riss maintains a separate government division that specializes in transporting Classes A & B Explosives and other government traffic and is ready, willing, and able to

handle all the loads tendered to us by the U.S. government, and indeed, much aditional traffic of that nature if it would be tendered to us.

Riss solicits this traffic from the various U.S. Government Agencies and, in fact, to response to recent solicitation for additional traffic from the U.S. Government Routing Agencies, received a response dated May 10, 1968 from the Military Traffic Management and Terminal Service who handles the routings for the U.S. government, a copy of which is attached and made a part hereof. It is to be noted "the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines."

The instant application for temporary authority is under Section 210A (a) of the Interstate Commerce Act which provides in essence that a requirement necessary before the grant of temporary authority is to prove an "immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need".

The support from the so-called shipper to this application is from the Department of Army, Office of the Judge Advocate General in a letter to the Temporary Authority Board of this Commission dated May 15, 1968. A careful reading of this support letter shows that there has been no statement to support the allegation there is an absence of service or an inadequacy of service on the part of the common cariers to handle the freight for the Department of Defense.

As a matter of fact the regulations governing the participation of the military services in proceedings before transportation regulatory bodies, chapter 105, recites that: "The Commander, Military Traffic Management and Terminal Service is responsible for determining the Department of Defense interest in proceedings before transportation regulatory bodies such as the Interstate Commerce Commission." With respect to the instant appli-

cation it is interesting to note that the letter of support comes from the Office of the Judge Advocate General of the Department of Army rather than from the Military Traffic Management Agency, which agency is the proper party to determine the participation in an application of this nature.

Riss has a safety department and is fully cognizant and observes strict compliance with all the safety rules and regulations of the I.C.C., Department of Transportation, and the various states in which it operates. All drivers are thoroughly screened and processed and their prior records checked previous to their being allowed to drive in the service of Riss. Riss has a direct telephone line connecting the general office to each of its terminals, and the terminals to each other. It is fundamental that until Riss and the other permanent certificated common carriers have been utilized in transporting the involved commodities and have been found to not be able to render reasonably adequate service, that no further certificates, temporary or otherwise, need be granted to any other applicants. We respectfully submit on behalf of Riss that there has not been a showing of any immediate or urgent need of this proposed service, and further that Riss is able to handle much more additional traffic for the supporting shipper and has been in the business of transporting these commodities for many years, has increased its trailer fleet with trailers equipped to handle the commodities involved, and is in a position to handle much more traffic of this nature. Insofar as the destination states are concerned, Riss interlines with a multitude of certificated common carriers at Denver, Colorado for delivery to the destination states. We respectfully request the application for temporary authority be denied.

Respectfully submitted,

Riss & Company, Inc.
IVAN E. MOODY
Ivan E. Moody
Vice President/General Counsel

BEFORE THE

INTERSTATE COMMERCE COMMISSION

BUREAU OF OPERATIONS

OKLAHOMA CITY, OKLAHOMA

DOCKET No. MC 129908 TA

AMERICAN FARM LINES

641 North Meridian

Oklahoma City, Oklahoma 73107

NOW COMES T.I.M.E. FREIGHT, INC., Post Office Box 2550, Lubbock, Texas, and files this its protest to the above styled application and would show the Commission that it is a common carrier motor carrier operating generally over regular routes; however, over some irregular routes transporting general commodities but including general commodities including classes A and B explosives, restricted to traffic moving on Government Bill of Lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand; and on the other, points in Washington, California, Nevada, and Arizona, either direct or in connection with reliable connecting lines.

American Farm Lines, by its application in MC 129908 TA, filed May 17, 1968, and appearing in the FEDERAL REGISTER, Vol. 33, No. 104—Tuesday, May 28, 1968, seeks temporary authority to transport general commodities including classes A and B explosives, restricted to traffic moving on Government Bill of Lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand; and on the other, points in Washington, California, Nevada, and Arizona, for 180 days.

As to the portent of this application, it is in conflict with T.I.M.E. Freight, Inc.'s authority (MC 35320 and related

subs thereto—copy attached) to transport general commodities with the usual exceptions on a direct basis between certain points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Texas, Oklahoma and Kansas on the one hand; and on the other, points in California and Arizona. In addition, protestant transports traffic indirectly between Louisiana and points in Washington, California, Nevada and Arizona by reliable connecting lines.

T.I.M.E. Freight, Inc. has terminals in Paris, Tennessee serving southwestern Kentucky; Evansville, Indiana; Chicago, Illinois; St. Louis, Missouri; Springfield, Missouri; Kansas City, Missouri (serving Kansas City, Missouri and Kansas City, Kansas); Little Rock, Arkansas; El Paso, Texas; Lubbock, Texas; Tulsa, Oklahoma; Oklahoma City, Oklahoma; Sacramento, California; Los Angeles, San Francisco, California; Tucson, Arizona; and Phoenix, Arizona. In addition, T.I.M.E. Freight, Inc. operates terminals in Dallas, Texas and San Antonio, Texas. This portion is being operated under temporary authority in MC-F-9822 copy attached.

Protestant has 496 over-the-road tractors and 1,489 over-the-road trailers, which are not being utilized and stand ready, willing, and able to transport and perform the services sought in the instant application.

The Commission's Special Procedures for Motor Temporary Authority have the effect of statutes under the rules of filing of applications:

> "(c) Supporting statements. Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers . . .". "Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested).

(3) Volume of traffic involved, frequency of movement and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's docket number, if

known, and state whether such application was granted or denied and the date of such action, if known."

It is noted that the above rules or statutes are mandatory and not permissive. Therefore, applicant must accompany its application with supporting statement containing 100% of the above information. Protestant alleges that the applicant has completely failed in this respect. It has not adhered to any of the above rules except a portion of (10) by furnishing the name of motor carrier who will provide service and is filing application for temporary authority. Such language "desirability" certainly does not establish an immediate and urgent need for service which cannot be met by existing carriers. Applicant has not named one single carrier that is not performing the service desired.

T.I.M.E. Freight, Inc. avers that applicant has failed in its burden of proof in that it has not (1) established an immediate and urgent need for service which cannot be met by existing carriers and (2) has failed by not meeting the mandatory statutory requirements as set out in the Commission's rules.

Protestant's interest in the application is that protestant, T.I.M.E. Freight, Inc., has handled traffic for the shipper in the past and knows of no complaints as to its service. Should the application be granted it would materially change the competitive situation and divert traffic from T.I.M.E. that it is presently handling or could be handling and such traffic is of vital interest to this protestant.

WHEREFORE premises considered, T.I.M.E. Freight, Inc. prays the Commission that the application be denied.

Respectfully submitted,

FRANK M. GARRISON
Attorney for Protestant,
T.I.M.E. Freight, Inc.
Post Office Box 2550
Lubbock, Texas 79408

June 11, 1968

Mr. C. L. Phillips
Interstate Commerce Commission
Bureau of Operations
American General Building
210 N.W. 6th Street
Oklahoma City, Oklahoma 73102
Re: American Farm Lines, Oklahoma City, Oklahoma MC 129908 TA, Federal Register May 28, 1968, page 7796

Dear Sir:

Please accept this protest to the above application on behalf of Tri-State Motor Transit Co. of P.O. Box 113, Joplin, Missouri.

This application includes a request to transport Classes A and B Explosives, moving under Government Bills of Lading between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and on the other, points in Washington, California, Nevada and Arizona. This protest is restricted to the identified transportation of Explosives.
As evidenced by the attached authorities, Appendix I, your protestant holds authority to transport in direct single-line service traffic between the majority of the requested states as well as participate in two-line interchange service offering to provide service between all requested points except Louisiana.

In connection herewith your protestant operates strategically located terminal facilities throughout the involved territory which include explosive interchange lots, maintenance facilities, washing facilities, dispatch, etc., near Richmond, Kentucky; Seneca, Illinois; Joplin, Missouri; Texarkana, Texas; Maytown, Washington; Concord, California; Idaho Falls, Idaho; and Louviers, Colorado. These facilities are so located as to provide equipment pools within relatively short distances of any principal shipping

origin involved in this temporary application. All these facilities excepting only Concord and Idaho Falls (which are leased) are owned and represent investments measured in the hundreds of thousands of dollars. For example, Seneca has some 500 acres; Joplin has 350 acres; Texarkana has 120 owned and 120 leased with option to purchase; Louviers has 157 acres. The Louviers, Maytown and Texarkana terminals have revetted interchange facilities affording protection on explosive loads either for the purposes of interchanging or for purposes of holding while the power equipment can be serviced and/or inspected. Seneca provides a revetted interchange facility with an additional or larger one under construction and nearing completion. Your protestant holds out to transport Classes A & B Explosives on a direct basis either in single-line or in multi-line service between all requested points excluding Louisiana as heretofore stated. Reference is made to Docket No. MC-F-9417 Tri-State merger DeTar Distributing which has been approved by Interstate Commerce Commission and is presently pending consummation which would add Louisiana as a state being provided direct service. As an illustration, your protestant may transport between the Crane Naval Ammunition Depot in Indiana on the one hand, and, on the other any point in the states of Washington, California, Nevada, Utah andArizona. By combining its Sub No. 141 with its Sub 57 over a Seneca or Ottawa, Illinois gateway, it may transport between any point in Illinois and any point in Washington, California, Nevada, Utah and Arizona. This is an incomplete listing but is representative and descriptive of the certificated ability of your protestant to provide the entire requested service on Classes A & B Explosives.

The extract of authorities, Appendix I, has been marked in green to identify the more pertinent ones. The Sub 132 contains some 40 pages but authorizes most principal highways in Illinois, Indiana, Ohio, Kentucky, and North Western Tennessee. The 132 physically connects at West

Memphis, Arkansas, St. Louis, Missouri; Seneca, Illinois and Wolf Lake, Illinois with other authorities.

Your protestant operates some 305 sleeper cab two-man power units and has some 600 trailers all of which are company owned plus 62 under lease purchase, all trailers are adapted to the handling of explosives and are available to meet any requirement. This equipment is not being fully utilized and stands ready, willing and able to transport and perform the services sought in the instant application insofar as Classes A & B Explosives are concerned. Traffic subject diversion Appendix II.

Your protestant practices providing set-out trailers or establishing equipment pools at strategic locations particularly for the convenience of the United States Government. These include Crane, Indiana; Blue Grass Arsenal, Kentucky; a pool at its Texarkana terminal and extensive pools at the overseas or ocean loading points of Concord, California and Maytown, Washington.

Your protestant is familiar with the letter by the Department of Army purporting to support this request for temporary authority and states it fails to show any deficiency in either the existing services or that of your protestant. This letter further fails to reflect that your protestant cannot effect and is not presently providing the same or better reduced transit times between the involved points. In fact, your protestant has developed terminal facilities, set-out equipment pools for the sole purpose of being able to provide a service of logistical effectiveness to the government. Your protestant believes and alleges that of the more than 1200 shipments referred to by the Department of Army, that any which may have involved Classes A & B Explosives were denied your protestants and other certificated carriers similarly situated and has resulted in non-regulated transportation which practice, if continued, will end in destroying, fragmentizing, and denying a national transportation system by highway

adequate to meet the needs of the commerce of the United States and of the National Defense. In fact, Chapter 105 of the Defense Regulation (Ch. 18. AR 55-3551) NAUSUP Pub 444 Ch. 18/C 18 HFM etc. provides support of this type will only be undertaken when:

a. There is no carrier authorized

(or)

b. The service of authorized carrier is inadequate

The Department's position would appear to fail to even meet its own regulations.

Your protestant believes that the military establishment is in effect stating it desires to create an unregulated rate war and will do so through supporting as many diverse carriers and routes as it can and feels this will result in an immediate reduced cost to the government without giving consideration to the eventual chaotic conditions which would be created thereby by reverting from regulated transportation providing an adequate system for defense, to the wars of the jungle.

The exemption as referred to by the Department of the Army states in effect that a true cooperative may transport government traffic or nonmember traffic when proceeding for a member load or returning from a delivery of a member load in order to avoid and eliminate an empty trip. The District Court of the United States for the Western District of Oklahoma in its decision enjoined the American Farm Lines from providing a total transportation service by dedicating itself to serving the Department of Defense without (1) appropriate authority from the Interstate Commerce Commission or (2) the same being related to its member business. The statement that American Farm Lines has been required to decline over 700 loads evidences by innuendo that the existing carriers were able to provide all required service

for at no place does the Department state there was an absence of service or any inadequacy of existing service.

The entire tenure of this support is absolutely contra to the precepts which the Interstate Commerce Commission has long stood for, namely, the offering of a reduced rate in order to secure shipper's support completely fails to establish an immediate and urgent need for which there is either an absence or inadequacy of service.

> "The Commission xxx will not approve the creation of excessive capacity and needless duplication of services which would tend to adversely affect the continuance of efficient operations by existing carriers" see MR & R Trucking Co., Ext.—Birmingham, 105 MCC 69, 80.

Your protestant has read the protests as provided by T.-I.M.E. Freight Inc. where on pages 2 and 3 certain fundamental failures to comply with existing reguiations of this Commission are pointed out. In the interest of brevity your protestant hereby adopts these same specific deficiencies in meeting the mandatory statutory requirements.

Wherefore, having fully answered the application, through showing its ability to provide the required service, that it is providing service within the territory and that any grant of authority as herein requested (which would include Classes A & B Explosives) would be detrimental to your protestant, would result in a deterioration of that service which it has heretofore provided the public, as well as the Department of Defense; your protestants prays: that this application be denied in its entirety as (1) failing to evidence a public need as (2) failing to show that the existing carriers are not adequate and able to provide all the required transportation and (3) failing to evidence an inability on the part of the existing carriers to be able

to meet all the requirements of the Department of Defense.

Respectfully submitted,

Tri-State Motor Transit Co.
By: GEORGE F. BOYD
George F. Boyd
President-General Manager

June 17, 1968

Mr. C. L. Phillips, District Supervisor
Interstate Commerce Commission
Bureau of Operations, Room 350
American General Building
210 Northwest Sixth
Oklahoma City, Oklahoma 73102

Dear Mr. Phillips:

Please accept this letter and six (6) copies as a protest to the application of AMERICAN FARM LINES, Docket No. MC 129908 TA as published in the Federal Register of May 28, 1968 and as corrected in the June 8, 1968 issue. The application is so general that it cannot be determined what commodities are to be transported and the purpose of this protest is to protect our authority to transport motor vehicles within some of the area covered by the application.

United Transports Inc., in Docket MC-71902 and subs 35 and 63 thereto is authorized to transport in secondary truckaway service, automobiles, trucks, tractors, cabs, chassis, bodies, and parts thereof between points in Missouri, Texas, Oklahoma, Kansas and Texarkana, Arkansas on the one hand and on other points in Arizona. Through connecting lines, United can render service to all of the other states involved in the application. United maintains terminals in Kansas City, Missouri; Tulsa and Oklahoma City, Oklahoma; Floydadla, Houston and Irving, Texas at which 196 truckaway units and drivers are based. There

drivers and equipment can be dispatched anywhere within the territory that United is authorized to serve.

If this applicant intends to handle motor vehicles, the grant of this application would create a new service resulting in substantial competition to protestants between points where there is already keen competition for the available traffic.

Protestant hereby certifies that a copy of this protest has been on this day forwarded by first-class mail to Mr. Wesley L. Johnson, 641 North Meridian, Oklahoma City, Okla. 73107.

Respectfully submitted,

United Transports Inc.

by ERIC L. SPITLER
Eric L. Spitler, its Vice
President—Traffic & Sales
21990 Greenfield Road
Detroit, Michigan 48237

Dated at Detroit, Michigan, June 17, 1968

BEFORE THE

INTERSTATE COMMERCE COMMISSION

American Farm Lines—Temporary Authority

MC-129908 TA

Protest of Western Railroads

COME NOW the Western Railroads specified in the appendix hereto, and for Protest to the application in the captioned proceeding, state:

In Ex Parte No. MC-67, *Motor Carrier Temporary Authorities,* 98 M.C.C. 483, the entire Commission promulgated rules to govern the filing, processing and determination of applications for temporary authority. For the

most part, they are no more than a restatement of statutory and case law.

As here pertinent, they provide that temporary authority will be granted only upon a clear showing that there exists an immediate and urgent need of service from and to specified points or areas having no carrier service capable of meeting such need. Immediate and urgent need

> "will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of distribuition, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed." (240.4(b)(2)).

Supporting statements of shippers are an indispensable part of applications for temporary authority. They must reflect, among other things, definite need of a broad territorial grant, where sought; volume and frequency of movement; how long the asserted need is likely to continue; recital of consequences if service is not made available; whether efforts have been made to obtain the service from existing motor, rail or water carriers and the dates and results of such efforts; and, the names and addresses of existing carriers which have either failed or refused to provide the service, together with reasons given for any such failure or refusal. (240.2(c)).

Where, as here, precise information is required to enable the Commission properly to determine the issues presented, a governmental agency stands in the same position as a commercial shipper.

In *National Freight, Inc., Extension—Commodities in Bulk*, 84 M.C.C. 403 (1961) Division 1 said:

> "Turning to the issue of the classified nature of this information, it is not our duty to inquire into the internal rules and security regulations of GSA. We are aware that security regulations have at times placed restrictions upon the free publication of transportation data; however, such restrictions cannot serve as a substitute for the information which is requisite to a proper determination of public convenience and necessity. In *Riss & Company, Inc., Extension—Explosives*, 64 M.C.C. 299, 328, the Commission said:
>
> > 'While we recognize certain disabilities of the military in the presentation of evidence, we must, in order to carry out our duty under the Act, be furnished with sufficient facts on which to base our conclusions with respect to the need for motor service. Unless such facts are made available, we cannot act intelligently in disposing of the issues, and particularly, where as here, the problems presented are varied, complicated, and controversial. Where necessary facts are lacking, we are not warranted in making allowances for the failure to produce them or in according the Department of Defense or any other shipper special consideration, except perhaps under some unusual circumstances.' "

In this proceeding we have the ironic situation wherein one federal agency is purportedly supporting an operation that has been held by another federal agency—the judiciary—to have been unlawfully conducted.

The only supporter of the exceedingly broad application is the Department of Defense. That support is voiced by the Secretary of the Army by means of the letter of May 15, 1968, signed by the Chief, Regulatory Law Division, Department of the Army, and addressed to officials of the Commission.

None of the essential information above outlined and required by Rules 240.2(c) and 240.4(b)(2) is given. No attempt is made to meet the test relating to "immediate and urgent need". Indeed, it is not even claimed there is an immediate and urgent need which cannot be met by existing carrier service. Rather, the vague and indefinite support of every conceivable commodity moving between unspecified points between broad areas is based merely upon the desirability to the Army to continue to make substantial use of enjoined unlawful operations. There is no suggestion whatsoever that the existing rail, T.O.F.C., and motor carrier transport system is incapable of meeting the shippers' transportation requirements.

The lack of specificity of the so-called support makes a grant a legal impossibility. As a practical matter, it also makes it impossible for these Protestants to show specifically the services they render, for there are literally hundreds of thousands of combinations of origins, destinations and commodities moving between the considered territories. Suffice it here to say that, collectively, they serve all ammunition depots and all other points of consequence in the areas applied for, and render either single- or joint-line service between all such points within them. Further, on some regular movements, they handle explosives by T.O.F.C. in specialized trailers dedicated to those regular movements. In some instances those trailers are interlined in rail-motor movements. These Protestants can and will provide all of the service required.

By no stretch of the imagination can it here be held that the statutory requirement that temporary authority may be granted only where there is an urgent and immediate need for service which cannot be performed by existing carrier service has been met.

Further, the issue of fitness is squarely presented.

Applicant is the subject of two injunctions recently issued by the District Court for the Western District of

Oklahoma. Moreover, its operations and practices are at issue in the Commission's Docket No. MC-C-5835. These Protestants urge that in these circumstances applicant cannot at this time be found fit.

In any event, the application presents nothing more than an attempt to circumvent the rulings of a federal court upon purported support which fails in numerous respects to satisfy the pertinent statutes, decisions and rules.

The application should be denied in its entirety.

Respectfully submitted,

ED WHITE
Ed White

280 Union Station Building
Chicago, Illinois 60606
312/726-6900

Attorney for Western Railroads

Address Reply To:
P.O. Drawer 9897
El Paso, Texas 79989

June 19, 1968

Mr. C. L. Phillips
District Supervisor
Interstate Commerce Commission
Bureau of Operations
Room 350, American General Building
210 Northwest Sixth
Oklahoma City, Oklahoma 73102

Re: Docket MC-129908 (Sub TA) Applicant—American Farm Lines

Dear Mr. Phillips:

We wish to protest the above referenced 180 day temporary authority application in which applicant seeks to transport, over irregular routes, general commodities, including Classes A and B explosives, restricted to traffic moving

on Government Bills of Lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisana, Texas, Oklahoma, and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Utah, and Arizona. In support of our position, we state as follows:

Whitfield Transportation, Inc., is a for-hire common carrier of general commodities, with the usual exceptions, operating generally between Arizona, New Mexico, Texas and Utah, by virtue of Certificate MC-108461 and Subs as issued by the Interstate Commerce Commission. The attached map sets out our general area of operation, showing our principal gateways, routes and terminals maintained. In performing its service under its certificates, protestant utilizes a fleet of modern equipment, consisting of 39 road tractors, 127 over-the-road trailers, and 101 pieces of pickup and delivery equipment.

We have eleven full-time salesmen, including an off-line salesman in the Pacific Northwest, all of whom vigorously and actively solicit the traffic involved in subject application. A very substantial portion of our revenue is derived from traffic moving on Government Bills of Lading between the Government installations located in the Ogden, Utah area and those in the Southern, Southeastern and Southwestern areas, both in direct and interline services. Our interest is limited to general commodities, however, and any appreciable diversion of this government traffic would necessarily result in a curtailment of the present level of service to the general public, as well as the Government installations. Protestant, in its Sub No. 28 Certificate, is restricted to Government Bill of Lading traffic only from and to the installations in the Ogden, Utah area.

All of this magnifies the extreme importance this Government Bill of Lading traffic has to protestant's overall economic picture as well as its ability to continue to fulfill their obligations to the public. Protestant can serve

quite a few of the involved installations direct and, with a few exceptions, the others can be served by one interline beyond our gateways. We have worked closely with all Government Installations to meet their transportation needs, rate matters as well as service. No service complaints have been received on our transportation performance from any of the installations we serve.

We are but one of the smaller carriers who depend on Government Bill of Lading traffic and there are carriers too numerous to name here, regular or irregular route, specialized, general commodity, etc., all of whom vigorously solicit this involved traffic, as does this protestant, throughout the scope of this application. They, as we do, stand ready, willing and able to perform every aspect of service sought in this application, and to the satisfaction of the supporting shipper. From our past several experiences in attempting to secure government support for a *needed* service, it is very difficult to understand how this Governmental Department can give their actual support when there exists an overwhelming abundance of all types of common carriers available to meet their every need.

Under the circumstances, there is no possible way for this supporting shipper to establish that an urgent and immediate need exists. as required by your Commission. The rules and instructions under Section 210a(a) of the Act are explicit and state, in effect, that your Commission is empowered to grant temporary authority only in cases where there is a need for the service and *there are no carriers, rail or motor,* capable of rendering the service. It is submitted there are ample carriers, both rail and motor, not only capable but are willing and able to perform the service sought. We respectfully urge subject application be denied in its entirety.

Respectfully,

Whitfield Transportation, Inc.
J. P. Rose
Vice President-Traffic

BEFORE THE
INTERSTATE COMMERCE COMMISSION

In The Matter of:

AMERICAN FARM LINES, APPLICATION-
GENERAL COMMODITIES, INCLUDING CLASSES
A AND B EXPLOSIVES

Docket No. MC 129908 TA

Protest of Yellow Transit Freight Lines, Inc., Watson-Wilson Transportation System, Inc.

To The Temporary Authorities Board:

Come now Yellow Transit Freight Lines, Inc. (Yellow Transit) and Watson-Wilson Transportation System, Inc. (Watson-Wilson) and file this protest to the application of American Farm Lines for temporary authority for 180 days to operate as a common carrier by motor vehicle over irregular routes transporting: General commodities, including Classes A and B explosives, restricted to traffic moving on Government bills of lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas on the one hand, and, on the other, points in Washington, California, Nevada, Utah and Arizona.

Yellow Transit is a common carrier by motor vehicle authorized by the Commission under Certificate No. MC 112713 and subs thereunder to transport general commodities, with the usual exceptions, over regular routes in the states of Tex., Okla., Kans., Mo., Ind., Ill., Mich., Ohio and Ky. It has authority to transport Classes A and B explosives over regular routes in the states of Tex., Okla., Kans. and Mo.

Watson-Wilson is a common carrier by motor vehicle authorized by the Commission under Certificate No. MC 70451 and subs to transport general commodities, with the usual exceptions, in interstate commerce in the states

of Calif., Ariz., Colo., N. Mex., Kans., Neb., Iowa, Mo., Minn., Ill., Tenn., Ga and S. C. It has authority to transport Classes A and B explosives in Calif., Ariz., N. Mex., Colo., Kans., Neb., Minn., Iowa, Mo. and Ill. It is presently being operated by Yellow Transit pursuant to authority granted in Docket No. MC-F-9030. The two carriers perform through service in through trailers between the territories in which each operates.

Watson-Wilson operates what it calls its Defense Transport Division, which concentrates in the transportation of explosives under U.S. Government bills of lading. This Division operates 61 long-term leased tractors and 175 over-the-road trailers. These vehicles, whenever necessary, are leased to Yellow Transit for the purpose of serving Government installations in Yellow Transit's authority. Thus these two protestant carriers, being under common control as stated, coordinate the operation of the Watson-Wilson Defense Transport Division vehicles between their two territories. In their general commodities operations, these protestants together utilize more than 800 over-the-road tractors and 1,800 over-the-road trailers. These vehicles are not being operated to full capacity and solicitation constantly is being made to increase the volume of traffic available to them.

Watson-Wilson serves numerous points in California and Arizona. In the transportation of explosives, it constantly interchanges equipment with other authorized carriers for transportation to points in Washington, Nevada and Utah.

These protestant carriers are presently serving the Department of the Army, both in the transportation of general commodities and in the transportation of Classes A and B explosives. They and the other carriers so serving, at the present time, in fact are filling the needs of the Department of the Army. There is no need for an additional carrier to be authorized to operate as sought

to be done by this application. The inevitable result would be the diversion of the traffic, or a significant part of it, from the carriers already serving in the field. There should be no grant of authority, temporary or otherwise, without a full opportunity for interested parties to present evidence at a formal hearing. There has been no demonstration by the applicant that there is an immediate and urgent need to a point or points within a territory having no carrier service capable of meeting such need. Therefore, there are no criteria present for the grant of temporary authority under Section 210(a) of the Interstate Commerce Act (U.S. Code, Title 49, Section 310 a).

WHEREFORE, Yellow Transit and Watson-Wilson respectfully request the Commission to deny this application.

Respectfully submitted,

JOHN M. RECORDS
John M. Records, Attorney for Protestants

Yellow Transit Freight Lines, Inc.
and Watson-Wilson Transportation System, Inc.

P.O. Box 8462 92nd at State Line
Kansas City, Missouri 64114

Dated: June 20, 1968
Due: June 23, 1968

P.O. Box 14048
Houston, Tex. 77021

June 6. 1968

Mr. C. L. Phillips
District Supervisor
Interstate Commerce Commission
Bureau of Operations
Room 350, American General Building
210 Northwest Sixth
Oklahoma City, Oklahoma 73102

Re: Application of: American Farm Lines Docket No. MC 129908 TA Published in Federal Register, Volume 33, Number 104, Page 7796, Dated May 28, 1968

Dear Mr. Phillips:

Comes now Younger Brothers, Inc., hereinafter referred to as protestant, and does hereby protest the granting of the authority sought by American Farm Lines, and as cause for this protest, does hereby respectfully show:

I.

Applicant American Farm Lines is asking your Commission to grant radial authority on General Commodities between several states on the one hand, and on the other, points in Washington, California, Nevada, and Arizona. The only restriction is that it be restricted to traffic moving on Government Bills of Lading.

II.

The authority sought by applicant in this application is extremely broad, commodity wise, and if the applicant is actually seeking this transportation in bulk, in tank vehicles, it conflicts with considerable authority presently held by protestant Younger.

Attached hereto and identified as Exhibit "A", and listed by Sub numbers, is a portion of the authority held by protestant Younger that will be duplicated on the granting of the instant application.

The restriction, "restricted to traffic moving on Government Bills of Lading", restricts the authority sought only to a shipper or consignee, and does not place any restrictions on the broad commodity description.

III.

Protestant Younger has, in the past, handled shipments between the territorial states involved in this application, moving on Government Bills of Lading. To the best of protestant's knowledge, service has been satisfactory as we have not received any complaints from the shipper, the U.S. Government, or contractors for the Government.

IV.

This traffic is certainly attractive to your protestant, and is the type traffic that we strongly solicit and feel quite capable of performing satisfactory to shipper and consignees' requirements. The revenue derived on this traffic is of great importance and is necessary to protestant to continue to offer the shipping public reasonable, safe, and efficient transportation.

Considering the authority held by protestant Younger, we hereby respectfully request that the application of American Farm Lines be denied, in its entirety.

Respectfully submitted,

Younger Brothers, Inc.

By: .....

Wray E. Hughes, Vice President, Traffic

Assistant Secretary of Defense
Washington, D. C. 20301

June 1968

Installations and Logistics
TS

Mr. J. David Brothers
President, American Trucking
Associations, Inc.
1616 P Street, N.W.
Washington, D.C. 20036

Dear Mr. Brothers:

This has reference to your recent letter to the Secretary of Defense asking that Department of Defense support of the application of American Farm Lines, Inc., for temporary Interstate Commerce Commission operating authority be withdrawn.

Your request is, among other things, based on the view that action in supporting the above mentioned application is a complete reversal of existing Department of Defense policy. I wish to assure you that such is not the case.

It has been the policy of this Department, in fact we are required, to obtain the commercial transportation services we need at the lowest sound cost with due consideration being given to service factors. Also a basic objective of long standing is the reduction of costs associated with the distribution of military supplies and equipment to the maximum feasible extent. Thus, we obviously have had a continuing interest in the shortening of the logistics pipeline with its attendant reduction in inventory levels.

Our indicated support of American Farm Lines' application for temporary authority is wholly consistent with our policy and with the objective stated above. Consequently, to withdraw this support would not be in keeping with the obligations this Department has to operate efficiently

and economically and to improve its logistics operations wherever possible.

American Farm Lines has provided a service for the movement of our traffic which has been excellent in every respect and has also resulted in significantly reduced rates. We desire that the type and quality of service which American Farm Lines has provided to the Department be continued. In fact, we would like to see it expanded wherever it may be feasible to do so.

Under the circumstances that exist now it seems to us that our interest in assuring the continued availability of such service can best be reflected by our support of American Farm Lines' application for temporary authority. We are sure that you would also agree that the rules of practice of the Interstate Commerce Commission require in the case of intervention in any of its proceedings, that the intervenor set forth his position in support of or in objection to the matter being considered. With this being the case and with our desire to have continued access to the type and quality service provided by American Farm Lines, it only follows that the DoD would have to indicate support for American Farm Lines' application.

With regard to the reference made in your letter to a communication from the Military Traffic Management and Terminal Service (MTMTS) in which it was stated that the DoD "is not in a position to state that there would be insufficient or inadequate service without American Farm Lines", we would point out that military logistics operations have to be carried on within the capabilities of resources and services available at any given time. Thus, our operations today are structured within the parameters of today's capabilities. To be satified, however, with today's capabilities and not to seek improvements in transportation services would, in our judgment, be turning our backs on progress, and not in keeping with our responsibilities to the Armed Forces and to the taxpayer.

In summary, we do not consider that support of American Farm Lines' application for temporary authority is a reversal of DoD policy, but rather that it is entirely consistent with previously announced policy and objectives of the Department. Further, we do not feel that our support of the American Farm Lines' application is an indication of preference for a particular carrier. On the other hand, we consider it as an expression of the desire of the Department of Defense to have available to it the type and quality of service which American Farm Lines has provided regardless of the carrier(s) which might provide same.

We trust that the foregoing will be helpful to your understanding of our actions in the American Farm Lines case. We would also like to assure you that this action is in no way an expression of dissatisfaction with any carrier members of your association. We are appreciative of and look forward hopefully to the same high level of support of our operations that we have received from them in the past.

Sincerely,

(Signed Thomas D. Morris)
THOMAS D. MORRIS
Assistant Secretary of Defense
(Installations and Logistics)

Order

Service Date July 15, 1968

TA-DEN.-1

At a Session of the Interstate Commerce Commission, Temporary Authorities Board, held at its office in Washington, D.C., on the 12th day of July, A.D. 1968.

No. MC 129908 TA
American Farm Lines
Oklahoma City, Oklahoma

Re: Request to transport general commodities, including Classes A and B explosives, moving on GBL, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Utah and Arizona.

Application by the above-named applicant filed under Section 210a(a) of the Interstate Commerce Act, as amended, for temporary authority to operate as a motor carrier, in interstate or foreign commerce, being under consideration, and

It appearing, That the said applicant has not established that there exists an immediate and urgent need for any of the service proposed;

It is ordered, That the said application be, and it is hereby, denied.

By the Commission, Temporary Authorities Board.

H. Neil Garson,
Secretary.

(Seal)

Notice to Parties: Special Rules of Practice Governing Procedure of the Temporary Authorities Board provide that petitions for reconsideration of the action of the said Board may be filed within 20 days following service of notice of such action. The Commission requires that the original and six copies of each such petition shall be filed and also a statement certifying that one copy has been served on each party of record in the proceeding.

Order

Service Date

September 5, 1968 TA-GR-1-1

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, acting as an Appellate Division, held at its office in Washington, D. C., on the 3rd day of September, A. D. 1968.

No. MC 129908 TA

AMERICAN FARM LINES
OKLAHOMA CITY, OKLAHOMA

The above-entitled application under Section 210a(a) of the Interstate Commerce Act, and applicant's petition for reconsideration of the order of the Commission, Temporary Authorities Board, entered herein on July 12, 1968, and reply or replies thereto being under consideration and good cause therefor appearing:

It is ordered, That said order of the Commission, Temporary Authorities Board be, and it is hereby, vacated and set aside.

And it appearing, That there is an immediate and urgent need for the motor carrier service described in the appendix hereto, and that there is no carrier service available capable of meeting such need;

It is further ordered, That applicant be, and is hereby, granted temporary authority, conditioned upon full compliance with all applicable statutory and Commission requirements concerning tariff publications, evidence of security for the protection of the public, and designation of agents upon whom process may be served, to engage in the business of transportation by motor vehicle, in interstate or foreign commerce, to the extent and in the manner set forth in the appendix hereto, subject to the further conditions that unless otherwise provided in the appendix (1)

the service herein authorized shall be limited to the movement of traffic which originates at and is destined to the points and areas specified in the appendix, and (2) no operating right separately described in the appendix may be combined with any other operating right therein described or with any other temporary or permanent authority now held by, or hereafter issued to, applicant or any other carrier.

It is further ordered, That the service authorized by this order shall not be commenced unless and until all the above-specified requirements have been met and applicant has received notice from the Commission that compliance has been effected and service may be instituted.

It is further ordered, That upon the authority herein granted becoming effective, failure of applicant to render reasonably continuous and adequate service to the public pursuant thereto and to maintain compliance with statutory and Commission requirements shall constitute sufficient grounds for suspension, change, or revocation of the said authority.

It is further ordered, That if applicant fails to comply with all applicable statutory and Commission requirements, rules and regulations within 30 days from the date hereof, or such additional time as the Commission may specifically grant, this order shall be of no further force and effect and the said application shall be deemed to be denied for want of prosecution and applicant so notified.

And it is further ordered, That, except as herein granted, the said application be, and it is hereby, denied.

By the Commission, Division 1, acting as an appellate division.

H. Neil Garson,
Secretary.

(Seal)

TA-GR-1

APPENDIX

No. MC 129908 TA

AMERICAN FARM LINES
OKLAHOMA CITY, OKLAHOMA

By the order of which this appendix is a part, entered under the name and number shown above, applicant upon compliance with the conditions set forth therein and after receipt of notice from the Commission that the said conditions have been met, and provided the operations are begun within the time allowed in said order or any extension thereof, is authorized to engage in the business of transportation by motor vehicle, in interstate or foreign commerce as follows:

Time for which authority is granted—90 days

Type of carrier—Common

Service authorized—

General commodities, including Classes A and B explosives, moving on Government bill of lading, over irregular routes,

Between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washinton, California, Nevada, Utah and Arizona.

SAFETY CONDITION: This grant of authority is conditioned upon applicant's maintenance of a satisfactory degree of compliance with the Federal Highway Administration's (Department of Transportation) Motor Carrier Safety Regulations. In the event of non-compliance with these regulations, that Administration may submit a recommendation for revocation of the authority.

Order

Service Date
September 12, 1968

INTERSTATE COMMERCE COMMISSION

No. MC 129908 TA

AMERICAN FARM LINES
OKLAHOMA CITY, OKLAHOMA

In the Matter of Request for Postponement of Effective Date:

PRESENT: Rupert L. Murphy
Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, and of request Navajo Freight Lines, Inc., protestant, filed September 9, 1968, for stay of effective date of the order of the Commission, Division 1, acting as an Appellate Division, dated September 3, 1968, which granted temporary authority; and good cause appearing therefor:

It is ordered, That the said request for stay, be, and it is hereby, denied, for the reason that no sufficient cause appears for granting the relief sought, but without prejudice to protestant's petition for reconsideration.

Dated at Washington, D. C., this 11th day of September, 1968.

By the Commission, Commissioner Murphy.

H. NEIL GARSON
H. Neil Garson,
Secretary.

(SEAL)

Order

Service Date
September 13, 1968

INTERSTATE COMMERCE COMMISSION

No. MC 129908 TA

AMERICAN FARM LINES
OKLAHOMA CITY, OKLAHOMA

In the Matter of Request for Postponement of Effective Date and for Finding of General Transporation Importance:

PRESENT: Rupert L. Murphy
Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, and of petition of American Trucking Associations, Inc., protestant, filed September 11, 1968, for a finding of General Transportation Importance and stay of effective date of the order of the Commission, Division 1, acting as an Appellate Division, dated September 3, 1968, which granted temporary authority; and good cause appearing therefor:

It appearing, That this proceeding does not fall within the category as provided by Rule 1.101(a)(4) of the Commission's General Rules of Practice for a finding of General Transportation Importance.

It is ordered, That the requests for stay and for a finding of General Transportation Importance, be, and they are hereby, denied, for the reason that no sufficient cause appears for granting the relief sought, but without prejudice to protestant's petition for reconsideration.

Dated at Washington, D. C., this 12th day of September, 1968.

By the Commission, Commissioner Murphy.

H. NEIL GARSON,
Secretary.

(SEAL)

Order

Service Date
September 17, 1968

INTERSTATE COMMERCE COMMISSION

No. MC 129908 TA

AMERICAN FARM LINES
OKLAHOMA CITY, OKLAHOMA

In the Matter of Request for Postponement of Effective Date:

PRESENT: Rupert L. Murphy
Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, and of petition of Munitions Carriers Conference, Inc., protestant, filed September 12, 1968, for stay of effective date of the order of the Commission, Division 1, acting as an Appellate Division, dated September 3, 1968, which granted temporary authority; and good cause appearing therefor:

It is ordered, That the said request for stay, be, and it is hereby, denied, for the reason that no sufficient cause appears for granting the relief sought, but without prejudice to protestant's petition for reconsideration.

Dated at Washington, D. C., this 16th day of September, 1968.

By the Commission, Commissioner Murphy.

H. NEIL GARSON,
H. Neil Garson,
Secretary.

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

Civil Action No. 3828

BLACK BALL FREIGHT SERVICE; CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; D-C INTERNATIONAL, INC.; GARRETT FREIGHTLINES, INC., NAVAJO FREIGHTLINES, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; WESTERN GILLETTE, INC.; RISS & COMPANY, INC.; IML FREIGHT, INC.; and AMERICAN TRUCKING ASSOCIATIONS, INC. *Plaintiffs.*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

Complaint To Set Aside and Annul an Order of the Interstate Commerce Commission

Plaintiffs respectfully petition this Honorable Court for a decree setting aside and annulling that certain order of the Interstate Commerce Commission, hereinafter referred to as the Commission, made and entered in the Commission's Order entitled, "Docket MC-129908TA American Farm Lines, Oklahoma City, Oklahoma on September 3, 1968, served on September 5, 1968, and for cause of complaint against the defendants allege:

I.

That Black Ball Freight Service is a corporation organized and existing under the laws of the State of Washington with their principal office and place of business at Seattle, Washington; that Consolidated Freightways Corporation of Delaware is a corporation organized and existing under the laws of the State of Delaware with their principal office and place of bussiness at Menlo Park, California; that D-C International, Inc. is a corporation

organized and existing under the laws of the State of Nebraska with their principal office and place of business at Denver, Colorado; that Garrett Freightlines, Inc., is a corporation organized and existing under the laws of the State of Idaho with its principal office and place of business at Pocatello, Idaho; that Pacific Intermountain Express Co. is a corporation organized and existing under the laws of the State of Nevada with its principal office and place of business at Oakland, California; that Navajo Freight Lines, Inc. is a corporation organized and existing under the laws of the State of New Mexico with its principal office and place of business at Denver; Colorado; that Western Gillette, Inc., is a corporation organized and existing under the laws of the State of California with its principal office and place of business at Vernon, California; that Riss & Company, Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business at Kansas City, Missouri; that IML Freight, Inc. is a corporation organized and existing under the laws of the State of Utah with its principal office and place of business at Salt Lake City, Utah; and that American Trucking Associations, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business at Washington D. C.

II

The Interstate Commerce Commission is an agency of the United States established by law and vested with authority over the operations of the plaintiffs pursuant to the provisions of the Interstate Commerce Act, as amended (Title 49 U.S.C.A., Section 301, et seq.)

III

This complaint is filed pursuant to Section 17(9) of the Interstate Commerce Act, as amended (Title 49 U.S. C.A., Section 17(9)), and 49 U.S.C.A. 305(g) and pur-

suant to Title 28, U.S.C.A., Sections 1336, 1398, 2284, 2321 and 2325, inclusive and Title 5 U.S.C.A. Sections 701-706. Plaintiffs invoke the jurisdiction of this Honorable Court under the provisions of said Sections and also under the provisions of Title 5, U.S.C.A., Sections 701-706.

IV

Venue lies in this judicial district under Section 1398 of Title 28, United States Code, because the principal office of Black Ball Freight Service is in this district.

V

The provisions of Section 2322 of Title 28 of the United States Code requires that actions to suspend, enjoin, annul, and set aside any order of the Interstate Commerce Commission shall be brought against the United States. By the provisions of Section 2323, the Interstate Commerce Commission may intervene as of right in any such action and it has been the Commission's practice invariably to do so. To obviate the filing of needless pleadings in this cause, plaintiffs bring this action against both the United States and the Interstate Commerce Commission.

VI

That the controversy tendered by this Complaint arises out of the issuance by the Interstate Commerce Commission of the order identified above, and set forth in Exhibit A, hereto attached, and by this reference made a part hereof. Said order was supported by a single letter written by a representative of the Department of the Army, a copy of which is hereto attached as Appendix B, and by this reference made a part hereof.

VII

That the Interstate Commerce Commission pursuant to authority conferred upon it by the Congress by the pro-

visions of Section 204(a)(6), 210a(a), 217, and 218 of the Interstate Commerce Act (respectively 49 U.S.C. Sections 304(a)(6), 310(a)(a), 317 and 318) and Sections 4 and 9(b) of the Administrative Procedure Act (respectively 5 U.S.C. 1003 and 1008(b)), instituted a proceeding "for the purpose of determining whether certain proposed rules or any other rules, should be prescribed to govern the filing, processing and determination of applications by motor common and contract carriers for temporary authority." That to said proceeding the Commission assigned the docket and title of *"Ex Parte No. MC67, Motor Carrier Temporary Authorities"*. That on April 7, 1965, the Commission formally enunicated its decision in said proceeding, as reported in 98 M.C.C. 483 et seq. That in said decision, as here pertinent, it was mandatorily required at page 486 of the report:

> "(c) *Supporting statements.*—Each application for Temporary Authority must be accompanied by a supporting statement (s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense, must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:
>
> (1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).
>
> (2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If

service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known."

It was further provided at page 490:

"(b) *Standards for determination.*—The following standards shall be used by the Temporary Authorities Board, and by Division 1 of the Commission acting initially or in an appellate capacity, in the absence of special or unusual circumstances, in the determination under section 210a(a) of the Interstate Commerce Act (49 U.S.C. 310a(a)) of applications for temporary authority.

(1) *General.*—Grants of temporary authority shall only be made upon the establishment of an immediate and urgent need for the transportation of passengers, or of particular commodities or classes of commodities, from specified origin points or areas to specified destination points or areas, having no carrier service capable of meeting such needs. Requests for temporary authority involving service to or from entire states, counties, or other defined areas will warrant approval only when supported by evidence that there is a compelling need for service to or from a representative number of points in each such state, county, or area, that there is a reasonable certainty that such service will be utilized, and that there is no carrier service available capable of meeting such need. Otherwise, such grants will be limited in accordance with the evidence to point-to-point authorization covering the immediate and urgent need for service."

It was further provided at page 491:

"(2) *Immediate and urgent need.*—An immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of

distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed."

VIII

That as to the order, which is the subject of this Complaint, the Commission failed to comply, and to require the respective applicant to comply, with its formally promulgated rules set forth in paragraph VII, supra, and in particular with the requirement that there was no existing carrier service to meet the need. All evidence was to the contrary as shown by Exhibit C, attached hereto, and by this reference made a part hereof.

IX

That each of the plaintiffs made appearances in the Temporary Authority Proceeding.

X

That the order herein complained of, and as is set forth in Exhibit A, is administratively final, and plaintiffs have exhausted all of their remedies before the Interstate Commerce Commission.

XI

Plaintiffs allege that in making and entering said order, the Interstate Commerce Commission exceeded its statutory and constitutional powers, and committed errors of law, in the following particulars:

(1) In that the Commission issued temporary authority to American Farm Lines without complying with the mandatory standards promulgated in its

Docket Ex Parte 67, that is, without establishment "of an immediate and urgent need for the transportation of * * * particular commodities or classes of commodities, from specified origin points or areas to specified destination points or areas, having no carrier service capable of meeting such needs."

(2) In that the Commission issued temporary authority to American Farm Lines without complying with the mandatory standards promulgated in its Docket Ex Parte 67, that is, without requiring establishment as to "service to or from entire States, counties or other defined areas" * * * "that there is a compelling need for service to or from a representative number of points in each such State, County, or area", and "that there is a reasonable certainty that such service will be utilized, and that there is no carrier service available capable of meeting such need."

(3) In that the Commission issued temporary authority to American Farm Lines without requiring compliance with the mandatory requirements promulgated in its Docket Ex Parte 67, that is, by complying with the requirements specified on pages 6 and 7 thereof.

(4) In that the Commission failed, despite its duty under the National Transportation Policy "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation."

WHEREFORE, plaintiffs respectfully pray:

1. That upon the filing of this Complaint, the District Judge to whom it is presented shall notify the Chief Judge of the Circuit Court, who shall designate two other judges, at least one of whom shall be a Circuit Judge, to serve together with said District Judge as members of the Court to hear and determine this proceeding;

2. That process in due form issue out and under the Seal of this Honorable Court, directed to the defendants as required by law and that due and proper service of such process be made upon said defendants, and that thereafter, defendants be required on or before a date specified in such process or summons issued by this Court to appear herein and to answer this Complaint;

3. That after final hearing, this Court adjudge, order and decree that said Order of the Interstate Commerce Commission, as is identified in Exhibit A, is, and at all times has been, beyond the lawful authority of the Interstate Commerce Commission, and is wholly unlawful and void, and that said order be perpetually set aside, cancelled and annulled;

4. That the plaintiffs have such other and further relief in the premises as the Court may deem just and equitable.

EISENHOWER, CARLSON,
NEWLANDS, REHA &
SINNITT
JAMES F. HENRIOT
Puget Sound Bank Building
Tacoma, Washington 98402

WILLIAM B. ADAMS
William B. Adams
624 Pacific Building
Portland, Oregon 97204

KING, MILLER, ANDERSON,
NASH & YERKE
CLIFFORD N. CARLSEN, JR.
Clifford N. Carlsen, Jr.
American Bank Building
Portland, Oregon 97205

STATE OF WASHINGTON
COUNTY OF KING } ss.

I, Lois Acheson, being first duly sworn, depose and state: That I am President of Black Ball Freight Service, a Washington corporation, one of the plaintiffs herein, that I have read the foregoing Complaint, know the contents thereof, and that the facts alleged therein are true and correct except as to the facts, if any, alleged to be upon information and belief, and that as to those I believe them to be true.

LOIS ACHESON
Lois Acheson

Subscribed and sworn to before me this 26th day of September, 1968.

Signature illegible
Notary Public for Washington

My Commission expires: 10/6/69

Appendix A is printed at page 143a-144a.

Appendix B is printed at page 14a-15a.

Appendix C is printed at page 11a-12a.

[1] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

No. 3828

BLACK BALL FREIGHT SERVICE CONSOLIDATED FREIGHTWAYS CORPORATION, ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

TRANSCRIPT OF PROCEEDINGS held in the above-entitled and numbered cause in the above-entitled court on Wednesday, October 2, 1968, before the Honorable GEORGE H. BOLDT, United States District Judge, at the United States Courthouse, Tacoma, Washington.

APPEARANCES

On behalf of the plaintiffs:

Mr. William B. Adams,
Adams, McLaughlin & Simpson,
Attorneys at law,
624 Pacific Building
Portland, Oregon, 97204

On behalf of the defendants:

Mr. Charles W. Billinghurst,
Assistant U. S. Attorney,
Federal Building,
Tacoma, Washington.

[2] PROCEEDINGS

Mr. Quinn: May it please the Court, I am Eugene Quinn of Eisenhower, Carlson, Newlands, Reha and Sinnitt. I represent the plaintiff here, but arguing this case for the plaintiff if William B. Adams of Adams, McLaughlin, & Simpson. I understand, Your Honor, he has been a member of this court since 1934.

The Court: It is a pleasure to have you aboard, Mr. Adams. I seem to have seen you quite recently.

You may proceed.

Mr. Adams: May it please the Court, just a brief history of the proceedings. This proceedings involves a temporary authority issued by the Commission of American Farm Lines. The background—in other words, they were the ones that were issued the temporary authority and background of the temporary authority is that American Farm Lines had been hauling explosives, but the carriers had—the other carriers in the State of Oklahoma went in and secured an injunction. The application for the injunction was supported by the Interstate Commerce Commission.

The Court found that American Farm Lines was operating without authority, whereupon, American Farm Lines filed an application with the Interstate Commerce Commission to secure temporary authority to haul not only [3] explosives but general commodities between various states.

The Court: This is closely parallel to the pending case, isn't it?

Mr. Adams: Yes, Your Honor.

We are alleging here the same thing that we did in the Acme Case, that there was no compliance with the Commission's regulation called Ex Parte MC-67.

Attached to the complaint is Exhibit B and C, which are letters of support, and you will recall that in the other case we had quite a big record.

The Court: I recall it very well. I read it from one end to the other.

• • • • • • • • • • •

[5] * * * My argument would be exactly as in the Acme case. In other words, on this principle, that the sole issue here is whether or not the Commission itself and the applicant, American Farm Lines, complied with the mandatory provisions of Ex Parte MC-67. I would cite the same cases throughout, and if you want me to do that—

The Court: Oh, no, I have read every one of those just in the last few days, very, very thoroughly.

Mr. Adams: Very well.

The Court: If you would like to talk about them, you may, but I have read them.

Mr. Adams: I don't want to just go over what I have there.

The Court: It won't be necessary. I have given them very close scrutiny in the last few days.

* * * * * * * * * * *

[22] The Court: Let me ask you this, I just dislike to interrupt your train of thought but I notice in reading this order, the one granting the temporary authority, the same one we have been talking about says in it, "And it appearing there is immediate and urgent need for the motor carrier service described herein and that there is no carrier service available capable of meeting such needs." That is what is recited. But so far as I can see, the only basis for any determination of whether or not there are other services available are these two letters, in the one instance signed by Mr. Wagner, Chief of the Law Division, and on the second one also Mr. Wagner [23] again. Now, Wagner in his letter says that the department is not in a position to state that it would be insufficient or inadequate without American Farm Lines.

Mr. Billinghurst: That is the letter dated April 30, 1968?

The Court: It is the same gentleman that signed the other letter in May, and neither one of the letters pretends to assert that there is not available service. In other

words, one of the recitals of the order is totally unsupported as far as the record before me is concerned.

Mr. Billinghurst: In the first place, Your Honor, the letter of April 30 is not a part of the application upon which the order was based.

The Court: Did it have any supporting data in it?

Mr. Billinghurst: The support for the order is the letter of May 15.

The Court: Where in there is there anything concerning otherwise available service? I just read it, I couldn't see anything in there about that.

Mr. Billinghurst: The third unnumbered paragraph contains a reference, and I don't have the entire file on this matter, but it contains a reference which I am told relates to the particular need for this particular service. The second sentence in the third unnumbered paragraph, [24] "Certain services of this company have afforded the Department of Defense a meaningful measure under practical conditions of character capability in general."

The Court: It is quite clear, I have read that, of course, but that has nothing to do with whether or not these plaintiff carriers or somebody else aren't available and capable of providing the service.

Mr. Billinghurst: The next sentence is significant, "Shorter service is necessary for shortening the pipe line," and they mention shortening a pipe line meaning getting their material from point to point more quickly, improving their logistics position.

The Court: Does that still say anything about any of these other people not being able to shorten the pipe line? These other people could shorten the pipe line couldn't they?

Mr. Billinghurst: I'm told there is a specific problem involved here, this company because of its peculiar organization and position is able to give direct service from points in the mid-west to the west coast without transferring its loads at intermediate points with the result that its serv-

ice is much quicker than that of its competitors. In other words, when this company takes a load, it leaves the warehouse, it delivers the load on the west coast using two drivers going straight through. [25] In the case of the other companies, and this is what the Army is referring to in saying it is shorter service, the load will be transferred from company to company at various points along the line. A company will take it, for example, from Denver to someplace in New Mexico where the load is then stopped until B company picks it up and so on. The saving in time—

The Court: I can understand how desirable and fine that would be, but what does the record show concerning whether or not the existing carriers are not capable of doing that?

Mr. Billinghurst: Only the reference to the shorter service.

The Court: But this other letter by the same man says they are not prepared to make any representation that the existing service wouldn't be insufficient or inadequate. It would seem to me that if he found out between the 30th of April and the 15th of May something about the subject of existing service, he ought to have spelled it out a little more particularly than that, wouldn't you think?

Mr. Billinghurst: I would say yes. However, I can't comment on the portions of the record that aren't here. I don't know.

The Court: I'm not being the least bit critical of you, Mr. Billinghurst, or anybody for that matter. I [26] am just trying to find out what, if any, authority the Court has to deal with this matter because clearly if it is within the discretion of the Commission to issue this, it isn't for me to even think about how they should have exercised or provided that they have some basis for exercising it. But it seems to me that obviously that the order in question recites something that I cannot see is shown or indicated in this record. Now, it may be that we just haven't got enough of the record here or something of the kind. But

this is a critical point, I might say, because I just happen to be sensitive to that point because this is the precise and exact point that we had in the Acme Cartage Case, which has been submitted for decision, and the reason that that is important is that that decision conceivably could have a very important bearing on this very point. In fact, it might be almost determinative of this point. In those circumstances I thought I should call it to your attension so that you could tell me.

Mr. Billinghurst: I do wish to advise the Court as completely as possible.

I make another reference to the second unnumbered paragraph which states, "The Department of Defense is constantly looking for ways to shorten the pipe line of its vital military supplies. This is effected through [27] reduced transit times between points of manufacture and warehouses and warehouses and points of export. A speed up in transit time will bring about a greatly improved logistics effectiveness resulting in reduced cost to the government."

The Court: That is most desirable and most commendable that they are doing that, but wouldn't you think that one of the things they ought to do is contract the existing carriers and see whether they are prepared to do what they desire?

Mr. Billinghurst: I'm sure that has been done, and I think that the fact that it is reflected in the first sentence referring to that particular carrier, its shorter service is necessary.

The Court: But that still doesn't say that these other people couldn't do the same thing if they were given a chance.

Mr. Billinghurst: The inference is—

The Court: But in the 8th and 9th paragraphs of the rules implementing the statute in question, 210 a (a), the one that authorizes the issuance of temporary authority, specifically requires that there shall be supporting statements for these applications and that each one

must at least specify what efforts have been made to procure the desired service urgently and immediately urgently [28] needed service and to specify in particular names, addresses, when, where, and all the rest of it, all of it in great detail. I don't see anything like that in here.

Mr. Billinghurst: The file as it is presented doesn't contain it, Your Honor.

The Court: That is the way it looks to me.

Mr. Billinghurst: Even though it doesn't, however, the peculiar nature of the law relating to the issuance of a temporary restraining order is such that in the absence of any requirement of showing substantial evidence of the immediate urgent need, where there is a showing of such an urgent need—

The Court: Well, I am not concerned about urgent need. There are two factors, the statute says plainly, I can almost quote it word for word because I have been poring over it, but it is plain in the statute that temporary orders may be authorized when, one, there is an immediate and urgent need for service; two, not available within the territory in question, and those are the conditions upon which the ICC has any authority to grant any temporary authority at all, and this is the question posed, of course, in Acme Cartage.

• • • • • • • • • •

[58] The Court: Very well.

Gentlemen, I am persuaded that in the situation now apparent that all of the necessary factors to be considered in granting a temporary stay are sufficiently shown of record, and I think that I should grant a stay and will do so with the proviso that if either an additional showing of some kind, which was not available to be presented at this time should be [59] desired, or some change in circumstances not now existing should arise, anyone who is able to show those conditions may make an application for vacation of the stay order. It will be heard as promptly as possible.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

CIVIL ACTION NO. 3828

BLACK BALL FREIGHT SERVICE; CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; D-C INTERNATIONAL, INC.; GARRETT FREIGHTLINES, INC.; NAVAJO FREIGHTLINES, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; WESTERN GILLETTE, INC.; RISS & COMPANY, INC; IML FREIGHT, INC.; and AMERICAN TRUCKING ASSOCIATIONS, INC., *Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

Order Staying Going Into Effect of Order

This cause having come on for consideration upon the motion of the plaintiffs for an order staying the going into effect of an order of the Interstate Commerce Commission pursuant to the provisions of Title 5 U.S.C., Sections 702, 703 704 and 705, and Title 28, Section 2284(3), pending determination of the issues of this proceeding, or until the further order of the Court, said motion being based on the verified complaint herein and the affidavits of Forrest Arnold, Earl J. Brooks, Edward A. Upp, A. John Warren, W. J. Wilson, David Inwood and others; and the Court, from said complaint, motion and the said affidavits and Testimony of record finds that unless this order is entered plaintiffs will suffer irreparable damage to their services as motor common carriers and to themselves; and the Court being advised in the premises:

IT IS ADJUDGED AND ORDERED that that certain order of the Interstate Commerce Commission issued by it in its Docket MC-129908TA application of American Farm Lines, Oklahoma City, Oklahoma under date of September

3, 1968, be stayed from going into effect or otherwise be inoperative pending a determination by this Court of the issues of this proceeding, or until the further order of the Court.

Dated and done at Tacoma, Washington in said District this 2 day of October, 1968.

GEORGE H. BOLDT
Judge

Order presented by:

JAMES F. HENRIOT
Of counsel for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

CIVIL ACTION No. 3828

BLACK BALL FREIGHT SERVICE, INC., ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

Motion To Stay Further Proceedings Herein

The United States of America and the Interstate Commerce Commission, defendants herein, move the Court to stay further proceedings herein and as grounds therefor state the following:

On October 3, 1968, this Court enjoined the effectiveness and operation of the Interstate Commerce Commission's order of September 3, 1968, in Docket No. MC-129908 TA, which granted to American Farm Lines temporary authority to conduct motor common carrier operations and

transport general commodities, including Class A and B explosives, moving on Government bills of lading between certain specified points.

When this injunction was issued, there were contemporaneously pending before the Commission numerous petitions for reconsideration of the order of September 3, 1968, filed by certain interested parties, including plaintiffs, to which the United States Department of Defense and American Farm Lines have now replied. The Department of Defense's reply has specified additional reasons indicating the existence of an immediate and urgent need for applicant's service which cannot be met by existing carriers. Since this evidence was not a part of the original record and no opportunity for reply was extended to protestants, the Commission issued an order on November 5, 1968, a copy of which is attached, reopening the proceeding for the purpose of receiving this evidence and replies thereto which will be considered in reaching a determination as to whether a grant of authority should be awarded. The Commission's order reopening the proceeding preserves the effectiveness of this Court's restraining order by postponing the effective date and operation of the order dated September 3, 1968, and directs American Farm Lines not to perform any for-hire operations.

Accordingly, we respectfully move that all proceedings in the instant court action, Civil No. 3828, be stayed pending a final determination by the Commission after reopening and further consideration.[1]

---

[1] Upon completion of the administrative proceedings by issuance of an order, it is intended that plaintiffs have the opportunity, if they so desire, to renew their request for relief from the Court.

SERVICE DATE
October 11, 1968

Order

INTERSTATE COMMERCE COMMISSION

No. MC-129908 TA

AMERICAN FARM LINES
(Oklahoma City, Oklahoma)

IN THE MATTER OF POSTPONING THE EFFECTIVE DATE OF ORDER

Present: PAUL J. TIERNEY, Chairman, to whom the above-entitled matter which is the subject of this order is assigned for action thereon.

Upon consideration of the record in the above-entitled proceedings, and the entry of a temporary restraining order on October 3, 1968, by the United States District Court for the Western District of Washington in Civil Action No. 3828, *Black Ball Freight Service, et al.* v. *United States,* wherein the Court stated in part:

> *It is adjudged and ordered* that that certain order of the Interstate Commerce Commission issued by it in its Docket MC-129908 TA application of American Farm Lines, Oklahoma City, Oklahoma under date of September 3, 1968, be stayed from going into effect or otherwise be inoperative pending a determination by this Court of the issues of this proceeding, or until the further order of this Court.

and good cause appearing therefor:

It is ordered, That the effective date and operation of the order heretofore entered September 3, 1968, in No. MC-129908 TA, be, and it is hereby, postponed until further order of the Commission.

It is further ordered, That in view of the Court's order and of the order of the Commission, American Farm Lines

may not now perform any for-hire operations in interstate or foreign commerce pursuant to the Commission's order of September 3, 1968, entered in this proceeding.

Dated at Washington, D. C., this 9th day of October, A.D., 1968.

By the Commission, Chairman Tierney.

(Seal)

H. NEIL GARSON
Secretary

SERVICE DATE
November 5, 1968

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C. on the 5th day of November, 1968.

No. MC-129908 TA

AMERICAN FARM LINES
(Oklahoma City, Okla.)

Upon consideration of the record in the above-entitled proceeding granting to American Farm Lines on September 3, 1968, a 90-day temporary authority to conduct motor common carrier operations and transport general commodities, including Class A and B explosives, moving on a Government bill of lading, over irregular routes, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and, on the other, points in Washington and Arizona; and (1) the entry of a temporary restraining order on October 3, 1968, by the United States District Court for the Western District of Washington in Civil Action No. 3828, *Black Ball Freight Service, et al.* v. *United States,* enjoining the order of September 3, 1968, from going into effect or otherwise becoming operative; and (2) the filing on various dates in September and October 1968, of numerous petitions of protestants for reconsideration of the said order of September 3, 1968; and replies thereto by applicant and the Department of Defense; and

It appearing, That the Department of Defense's reply to said petitions has specified additional reasons indicating an immediate and urgent need for applicant's service which cannot be met by existing carriers;

It further appearing, That the additional evidence referred to in the previous paragraph was not a part of the original record to which protestants have had an opportunity to reply; and good cause appearing therefor:

It is ordered, That the proceeding be, and it is hereby, reopened on the Commission's own motion for the purpose of receiving a verified statement from the Department of Defense which shall, to the extent the national defense and security will permit disclosure, specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers.

It is further ordered, That on or before November 20, 1968, applicant shall submit a verified statement from the Department of Defense, including therein the matter set forth in the preceding ordering paragraph.

It is further ordered, That on or before December 6, 1968, protestants may submit verified statements in response to any statement submitted by applicant;

It is further ordered, That all such verified statements submitted shall be served upon all other parties to the proceeding, and each statement shall so certify.

It is further ordered, That in view of the restraining order issued by the Court on October 3, 1968, the order of the Commission, Chairman Tierney, dated October 9, 1968, postponing the effective date of operation of the order entered September 3, 1968, be, and it is hereby, continued in effect and American Farm Lines be, and it is hereby, directed not to perform any for-hire operations in interstate or foreign commerce pursuant to the Commission's order of September 3, 1968, until further order of the Commission.

It is further ordered, That after expiration of the time period fixed for submission of verified statements the pro-

ceeding shall be reconsidered by us on the record as made together with such verified statements as may be filed.

By the Commission, Division 1, Acting as an Appellate Division.

H. NEIL GARSON
Secretary

(SEAL)

BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET NO. MC-129908 TA

AMERICAN FARM LINES

Motion To Vacate and Set Aside Commission's Order, Entered November 5, 1968, Reopening Proceeding for Reconsideration on Supplemented Record.

Comes now American Trucking Associations, Inc. (ATA), protestant herein, and files this motion to vacate and set aside Division 1's order, entered herein on November 5, 1968, reopening the proceeding for reconsideration on the record as supplemented by such verified statements as may be filed by the parties.

I

STATEMENT OF THE CASE

The Temporary Authorities Board, by order served July 15, 1968, denied American Farm Lines' application to transport general commodities, including Classes A and B explosives, moving on Government bills of lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Utah, and Arizona. Applicant filed a petition for reconsideration, and protestants replied thereto. Division 1, acting as an Appellate Division, by order served September 5, 1968, vacated and set aside the Board's order and granted the authority as sought. Numerous protes-

tants filed petitions for reconsideration of Division 1's order, and these petitions are presently pending before the Commission. Additionally, certain protestants, including ATA, filed a complaint in the United States District Court, Western District of Washington, seeking to set aside Division 1's order. By order entered October 2, 1968, the court stayed the effective date of Division 1's order pending a determination by the court of the issues in this proceeding, or until further order of the court. (*Black Ball Freight Service* v. *United States*, Civil No. 3828, W.D. Wash., October 2, 1968.) By order served October 11, 1968, the Commission, Commissioner Tierney, stayed the effective date and operation of Division 1's order until further order of the Commission. On October 16 and 17, 1968, the Department of Defense (DoD) and American Farm Lines, respectively, filed replies to protestants' petitions for reconsideration, and applicant's petition included a petition to reopen the record for the purpose of receiving the reply statement of DoD as evidence of record. ATA, and other protestants replied to that petition. By order served November 5, 1968, the Commission, Division 1, acting as an Appellate Division, reopened the proceeding, on its own motion, for the submission of a verified statement by DoD and such reply statements as may be filed by protestants. The order then provides that after expiration of the time fixed for the submission of such verified statements, the Commission will reconsider the proceeding on the record as made together with such verified statements as may be filed.

II

Division 1's Consideration of DoD's Reply to Protestants' Petitions for Reconsideration as Evidence in This Proceeding Was Improper

At the outset, we must seriously question the propriety of Division 1's action in treating DoD's reply to protestants' petitions for reconsideration as evidence "indicating an immediate and urgent need for applicant's service

which cannot be met by existing carriers." It should be noted that no provision of Part 1131 of the Commission's Temporary Rules[1] nor any provision of the Commission's General Rules of Practice sanctions the introduction of evidence in a reply statement. To the contrary, section 1100.101(b) of the Commission's General Rules sets forth the specific procedures which are to be complied with by a party seeking to introduce additional evidence in a proceeding. It provides:

> When in a *petition* filed under this section opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and *explanation must be given why such evidence was not previously adduced.* (Emphasis supplied)

DoD's reply does not comply in form or content with the above-stated provisions.

Applicant, in its petition to reopen the record in this proceeding for the receipt of additional evidence, requested that DoD's reply statement be received in evidence. We respectfully submit that if the Commission is to consider the evidentiary value of DoD's reply statement, such action can only be taken, if at all, after consideration of the merits of the probative value of the reply statement as urged in applicant's petition, and in light of protestants' motions and replies thereto, and not by summary action by the Commission upon its own motion.

III

Applicant's Petition To Reopen the Record Fails To Establish the Probative Value of DoD's Reply Statement

The central issue in this proceeding is whether there is an immediate and urgent need for service which cannot be

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[1] The Temporary Authority Rules do not provide for the submission of supporting evidence beyond the initial filing of shipper's statement of support.

met by existing carriers. The Commission has prescribed in detail the information required to establish such a showing. (49 C.F.R. § 1131.2(c)) In our reply,[2] filed November 6, 1968, to applicant's petition to reopen the record, we challenged the evidentiary value of DoD's reply statement. Therefore, we now request that such reply be incorporated as a part of this pleading. Thus, at this time, we will only briefly consider the probative value of DoD's statement.

The sum total of "specific" complaints about existing services raised by DoD in its reply related to three shipments of explosives moving between three origin points and two named destinations. We do not believe that such scant evidence could be considered as "indicative" of an immediate and urgent need for the movement of general commodities, including Classes A and B explosives, radially between points in a 14-State area. Additionally, only two existing carriers were actually named in the entire statement, and DoD readily admitted that one of them, namely Navajo, was providing satisfactory service. It is well established that complaints alleging inadequate service by unidentified carriers do not constitute proof of inadequate service by protestants; and it is equally well settled that the alleged service inadequacy of a carrier on one shipment is not even conclusive as to the overall adequacy of that carrier's service, much less the more than 110 other common carriers protesting this application.

The remainder of DoD's reply concerned itself with statements as to alleged dollar savings[3] resulting from the use of applicant's service, and a preference for single-line service. Such considerations clearly do not warrant a grant of temporary authority.

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[1] Although ATA's reply was timely filed, it is obvious that Division 1's order, entered November 5, 1968, did not consider the merits of that pleading.

[3] The Commission has held on numerous occasions that, unless the rates involved are so high as to constitute a boycott of the traffic, rate considerations will not justify the issuance of operating authority.

We submit that DoD's reply is not probative of any issue material to this proceeding, and we renew our objection to the receipt of such general allegations as evidence in this proceeding.

IV

Division 1, by Reopening This Proceeding for the Purpose of Supplementing the Existing Record Upon Its Own Motion, Has Shown Undue Preference for Applicant

It has been held that the Commission has continuing jurisdiction over its orders, and that an appellate divison may reconsider its own actions, at least until such time as a certificate of public convenience and necessity has been issued. See *Resort Bus Lines, Inc.* v. *Interstate Commerce Commission,* 264 F. Supp. 742 (S.D. N.Y. 1967) *Eazor Exp., Inc.—Purchase—Fleet Highway Freight,* 101 M.C.C. 719; and *Walter Poole Extension—Tractors to Alabama,* 105 M.C.C. 511. However, we submit that none of the cited cases justify the summary action taken by Division 1 in its order of November 5, 1968.

The Temporary Authority Rules provide that applications may be denied for failure to meet statutory standards. (49 C.F.R. § 1131.4(b)(8)) Protestants have contended throughout this proceeding that applicant has failed to make the requisite showing upon which a grant of temporary authority could be granted; and this was the thrust of plaintiffs' complaint in *Black Ball Freight Service* v. *United States, supra.* Nevertheless, Division 1, instead of reopening this proceeding to reconsider its order of September 3, 1968, in light of the evidence of record, would permit applicant to make its case *de novo* by allowing DoD to submit a verified statement specifying "the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers." We do not

believe that applicant should be allowed to so supplement its case at this late date.

Conclusion

Division 1's unprecedented action in this proceeding has deprived protestants of their right to contest the probative value of DoD's reply statement by totally disregarding their timely pleadings filed in opposition thereto, and would permit applicant to supplement its case in a manner contrary to the Commission's Temporary Authority Rules and General Rules of Practice. For these reasons, we move that Division 1 vacate and set aside its order of November 5, 1968, reopening this proceeding, upon its own motion, for reconsideration on the record as made together with such verified statements as may be filed.

Respectfully submitted,

American Trucking Associations, Inc.
Peter T. Beardsley
Richard A. Mehley
Nelson J. Cooney
John R. Bagileo
Attorneys

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET No. MC-129908TA

AMERICAN FARM LINES—
TEMPORARY AUTHORITY—
GENERAL COMMODITIES

Petition to Vacate Order

Come now Black Ball Freight Service, Consolidated Freightways Corporation of Delaware, the Garrett Freightlines, Inc., and respectfully petition the Commission to vacate its order of November 5, 1968, reopening the above entitled proceeding, and in support thereof show:

I

As stated in the subject order the United States District Court for the Western District Court of Washington in Civil Action No. 3828, entitled Black Ball Freight Service et al. v. United States of America and the Interstate Commerce Commission did enter an order, which as here pertinent reads:

> "IT IS ADJUDGED AND ORDERED that that certain order of the Interstate Commerce Commission issued by it in its Docket MC-129908TA application of American Farm Lines, Oklahoma City, Oklahoma under date of September 3, 1968, be stayed from going into effect or otherwise be inoperative pending a determination by this Court of the issues of this proceeding, or until the further order of the Court."

II

That the Court having taken jurisdiction of this matter, the Commission was without power to re-open the proceeding. This is established by the applicable statutes and by the Commission's own rules.

The rules of the Commission do not provide for re-opening of the record in Temporary Authority application proceedings.

Rule 101 of the Interstate Commerce Commission's Rules of Practice is the rule applicable to the factual situation here present.

Rule 101(2) recites as here pertinent:

> "All decisions, orders or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes or modifies a prior decision by a hearing officer, and those wherein the initial decision is made by a division. * * *"

In this proceeding the Temporary Authorities Board denied the application. American Farm Lines filed a petition for reconsideration. Division 1 of the Commission set aside the order of its Temporary Authorities Board and granted the application. All of these facts appear in the Commission's order of September 3, 1968, which is the subject of the Complaint.

Section 210a(a) of the Interstate Commerce Act (49 U.S.C.A. 310a(a)) specifically states that temporary authority applications may be processed without hearings. *Ex Parte No. MC-67, Motor Carrier Temporary Authorities,* 98 M.C.C. 483 covers the no-hearing process.

The Commission by regulation created a Temporary Authorities Board, a board of employes and relegated to it authority to determine temporary authority applications. The procedure as stated is specified in *Ex Parte MC-67.* No hearing is provided for.

It will be noted that Rule 101(2), quoted above, states that all decisions of a Division of the Commission shall be considered administratively final except where the Division

modifies a prior decision by a *hearing officer.* The Division did modify a decision, but it was not that of a hearing officer.

In *Transamerican Freight Lines, Inc.* v. *U. S.*, 258 F. Supp. 910, the Court stated that the disposition of an application by a Board did not constitute an oral hearing.

Moreover, Section 240.6 of C.F.R. (*Ex Parte MC-67*, 98 M.C.C. 483, page 496) provides:

> "§ 240.6 *Petitions.*
>
> (a) *Petitions for reconsideration.*—Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person."

Hence, the Commission has no further jurisdiction in this matter. The rules do not provide for a reopening of the record. They provide for reconsideration up to the level of the Division's action as an Appellate Division.

The rules we have referred to above are formally adopted rules of the Commission.

Ex Parte MC-67, 98 M.C.C. 483, at page 468 (Section 1131.2(c), provides that all supporting statements in temporary authority cases must be submitted with the application. There is no procedure for reopening or for the submission of additional data at a later date. If the applicant recognizes that it has failed to comply with the mandatory requirements of *Ex Parte MC-67*, it can refile and endeavor to overcome its failures in its prior application. The Court should not be whipsawed by the Commission merely because it now recognizes its error. Nor should the Plaintiffs be denied, if it becomes necessary, the right to chal-

lenge in Court the order of the Commission upon which it predicates its motion.

The order of the Commission, which is the subject of the Court Complaint, was that of an Appellant Division, see Exhibit A, attached to the Complaint.

Section 17 of the Interstate Commerce Act is the controlling statute. It provides:

(Divisions of Commission)

"SEC. 17 (1) The Commission is hereby authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time. Such divisions shall be designated, respectively, division one, division two, and so forth, or by a term descriptive of the principal subject, work, business, or function assigned or referred to such divisions. The Commission may designate one or more of its divisions as appellate divisions. Any Commissioner may be assigned to such division or divisions as the Commission may direct, and the senior in service of the Commissioners constituting a division shall act as chairman thereof unless otherwise directed by the Commission. When a vacancy occurs in any division or when a Commissioner because of absence, or other cause, is unable to serve thereon, the Chairman of the Commission or any Commissioner designated by him for that purpose may serve temporarily on such division until the Commission otherwise orders.

(Reference to Divisions)

(2) The Commission may by order direct that any of its work, business, or functions under any provisions of law (except matters required to be referred to joint boards by Section 205, and except functions vested in the Commission under this section), or any matter

which shall have been or may be referred to it by Congress or by either branch thereof, be assigned or referred to any division, to an individual Commissioner, or to a board to be composed of three or more eligible employees of the Commission (hereinafter in this section called a 'board') to be designated by such order, for action thereon, and the Commission may by order at any time amend, modify, supplement, or rescind any such assignment or reference. The following classes of employees shall be eligible for designation by the Commission to serve on such boards: examiners, directors or assistant directors of bureaus, chiefs of sections, and attorneys. The assignment or reference, to divisions, of work, business, or functions relating to the lawfulness of rates, fares, or charges shall be made according to the character of regulation to be exercised and not according to the kind or class of the carriers involved or to the form or mode of transportation in which such carriers may be engaged. When an individual Commissioner, or any employee, is unable to act upon any matter so assigned or referred because of absence or other cause, the Chairman of the Commission may designate another Commissioner or employee, as the case may be, to serve temporarily until the Commission otherwise orders.

* * * * *

(*Authority of Division*)

"(4) A division, an individual Commissioner, or a board shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission, and be subject to the same duties and obligations. The secretary and seal of the Commission shall be the secretary and seal

of each division, individual Commissioner, or board. Except as otherwise provided in this section, any order, decision, or requirement of a division, an individual Commissioner, or a board, with respect to any matter so assigned or referred, shall have the same force and effect, and may be made and evidenced in the same manner as if made or taken by the Commission.

(*Testimony at Public Hearings*)

(5) Any finding, report, or requirement of an individual Commissioner or board, with respect to any matter so assigned or referred involving the taking of testimony at a public hearing, shall be accompanied by a statement in writing of the reasons therefor, together with a recommended order, which shall be filed with the Commission. Copies thereof shall be served upon interested parties (including, in proceedings under Part II, persons specified in Section 205(e), who may file exceptions thereto, but if within 20 days after service upon such persons, or within such further period as the Commission or a duly designated division thereof may authorize, no exceptions shall have been filed, such recommended order shall become the order of the Commission and become effective unless within such period the order shall have been stayed or postponed by the Commission or by a duly designated division thereof. The Commission, or a duly designated division thereof, upon its own motion may, and where exceptions are filed it shall, reconsider the matter either upon the same record or after further hearing, and such recommended order shall thereupon be stayed or postponed pending final determination thereof. When deemed by the Commission to be appropriate for the efficient and orderly conduct of its business, it may authorize duly designated employee boards to perform, under this paragraph functions of the same character as those which may be performed thereunder by duly

designated divisions. (*Sub-section (5) as amended September 14, 1961.*)

(*Rehearings; Reargumentsy; Reconsiderations*)

(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5), any party thereto may at any time, *subject to such limitations as may be established by the Commission as hereinafter authorized,* make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. *Such applications shall be governed by such general rules as the Commission may establish.* Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an *appropriate appellate division for consideration and action.* Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; *but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration* of a decision, order, or requirement of the Commission *or of a division* so as to *confine such right to proceedings,* or classes of proceedings, *involving issues of general transportation importance.* Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2), if

such application shall have been filed within 20 days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5), and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

(*Modification of Reports*)

(7) If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

• • • • •

(*Judicial Review*)

(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable

in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise." (Emphasis supplied)

We have set forth the pertinent portions of the statute, because each such part relates to the matter herein presented.

In *Transamerican Freight Lines, Inc.* v. *U. S.*, 258 F. Supp. 910, the Court had before it the question of whether the Commission had power to review an appellate division decision, or otherwise to proceed further.

The Court there stated at page 913-915:

"By Section 17(1) the Commission is authorized by order to divide its members into as many divisions (each to consist of not less than three members) as it deems necessary, to be designated division 1, division 2, etc., or by a term descriptive of the function assigned to it by the Commission. One or more of the divisions may be designated as an 'appellate division.' Section 17(2) empowers the Commission by order to assign any matter, subject to exceptions presently irrelevant, to 'any division, to an individual Commissioner, or to a board to be composed of three or more eligible employees of the Commission.' Section 17(4) provides that either of these three entities—'a division, an individual Commissioner, or a board'—may hear and determine any business assigned to it, and that the decision, except as otherwise provided in section 17, shall have the same force and effect as if made by the Commission.

Subparagraphs (5), (6), (7) and (9) of section 17 are particularly relevant. These subparagraphs make it clear that when Congress used the word 'division' it did not mean to include an 'appellate division,' and that when it meant to refer to an 'appellate division' it used that precise term.

Subparagraph (5) provides that after an individual Commissioner or board renders a decision in a matter assigned to it involving the taking of testimony at a public hearing, the 'Commission or a duly designated division * * * shall' in specified circumstances reconsider the matter. At this point no reference is made to reconsideration by an appellate division. This is particularly significant when read in conjunction with subparagraph (6). Subparagraph (6) provides that if the matter reviewable by the 'Commission or a duly designated division' under subparagraph (5) has not been reconsidered by either of them, then any application for reconsideration 'shall be referred to an appropriate appellate division.'

Furthermore, subparagraph (6) specifies the entities from whose decisions applications for rehearing, reargument or reconsideration (hereinafter 'reconsideration') may be filed, and designates the entities to consider and act upon such applications. It states broadly that after a decision shall have been rendered by 'the Commission, a division, or individual Commissioner, or a board,' any party may apply for reconsideration of the decision, subject to such statutory authorized limitations as may be established by the Commission. In this general statement of the decisions reviewable there is no provision made for the filing of an application to reconsider a decision of an 'appellate division.' Subparagraph (6) then specifies with particularity the entities which are to consider and act upon the applications. If the decision is made by the Commission, the application must be considered by 'a division, an individual Commissioner, or a board,' the application may be considered and acted upon either by (1) the Commission or (2) by an 'appropriate appellate division' to which the Commission refers it. Thus, in specifying the entities whose decisions are subject to reconsideration, the statute for a second time omits any reference to an 'appellate division.'

(Reconsideration by ICC of Decision of Appellate Division)

Section 17(6) authorizes the Commission to adopt rules establishing limitations upon the right to apply for reconsideration of a decision 'of the Commission or of a division so as to confine such rights to proceedings, or classes of proceedings, involving issues of general transportation importance.' But, here again, for a third time in the same subparagraph, no provision is made for the reconsideration by the Commission of a decision of an 'appellate division.'

Subparagraph (7) of section 17 follows the same language pattern as does subparagraph (6). Thus it provides that if upon a reconsideration of a decision of 'a division, an individual Commissioner, or board' (note, no mention of an 'appellate division'), it appears that the decision is unjust or unwarranted, 'the Commission or appellate division' may reverse, change or modify the same accordingly.

Subparagraph (9), of section 17 fortifies the conclusion that once an application for reconsideration has been denied by an 'appellate division,' the Commission cannot exercise any right of review. It provides that when an application for reconsideration of a decision of a 'division, individual Commissioner, or board' shall have been denied or otherwise disposed of by the 'Commission or an appellate division,' a suit to enforce, enjoin, suspend or set aside the decision may be brought in the District Court. Once more, no reference is made to an application for the reconsideration of a decision of an 'appellate division.' "

Also at page 916 it was stated:

"The need for relieving the Commission of the burden of passing upon applications to reconsider many decisions of minor importance was recognized in the

annual report for 1935 which the Commission submitted to Congress. *Forty-Ninth Annual Report of the Interstate Commerce Commission*, pp. 95-97 (1935). That report proposed amendments to sections 16a, 17(4) and 17(6) of the Act, *supra*, which radically affected the review procedures and for the first time provided for appellate divisions. More specifically, the proposed amendments provided that when a decision was rendered by a division which had heard a case in the first instance, an application for reconsideration thereof might be heard and determined either by the Commission, or by an appellate division, to which the Commission referred it. An application for reconsideration of a decision of an individual Commissioner or board could be filed with a division and an application for reconsideration of the division's decision could be filed with an appellate division. In all instances when an application to reconsider the decision of either a division, individual Commissioner, or board was filed with an acted upon by an appellate division, its decision was final and no further relief within the Commission was possible.

The report of the Commission explained these amendments as follows:

> 'The foregoing amendments would authorize the Commission to create an appellate division or divisions of not less than five Commissioners, to which the Commission could refer applications for rehearings either generally or in particular cases or classes of cases. The decision of the appellate division in such cases would be final the same as if it were by the entire Commission. This would relieve the Commission of the necessity of having 11 Commissioners consider many cases which are not of such character or importance as to warrant such procedure.

> It is not believed that any party would suffer injury or any cause would be prejudiced by being finally disposed of by an appellate division of three members.'
>
> *Forty-Ninth Annual Report of the Interstate Commerce Commission*, p. 97 (1935)."

The Court went on to further hold at page 918:

> "The statute confers upon the Commission the power to review a decision of an individual Commissioner, a division, or a board, if the Commission considers the matter involved to be of sufficient importance to warrant Commission review. The Commission may accomplish this simply by reviewing the decision itself instead of referring it to an appellate division. The Commission has the choice in the first instance whether it or an appellate division will act upon an application to reconsider a decision. But once the Commission has referred the matter to an appellate division and the latter has spoken, under the statute that is the end of the matter so far as the Commission is concerned. Any review of the decision thereafter can only be had by a Court."

We recognize that the Commission has chosen to ignore this decision in two cases. In each the Commission attempted to get around the *Transamerican Farm Lines* decision. In the first case, *Eazon Express, Inc.—Purchase—Fleet Highway Freight Lines, Inc.*, 101 M.C.C. 719, the Commission stated at page 720 that the *Transamerican Case* is not controlling because the Court's above quoted holding was dicta. Likewise, in the second case, *Walter Poole Extension—Tractors to Alabama*, 105 M.C.C. 511, the Commission, at page 512, said the holding was dicta.

The quotations from the *Transamerican Case* clearly are not dicta, they cover the issue before the Court. This is

confirmed by the reporter's headnotes to the decision, which reads as follows:

"1. *Commerce*

Under the Interstate Commerce Act the Commission has no power to review an appellate division decision, even if the proceeding does involve an issue of general transportation importance. Interstate Commerce Act, § 17 as amended 49 U.S.C.A. § 17.

2. *Commerce*

The word 'division' in Interstate Commerce Act section relating to Commission procedure and delegation of duties and rehearings does not include an 'appellate division'. Interstate Commerce Act, § 17 and (2, 4-7, 9) as amended 49 U.S.C.A. § 17 and (2, 4-7, 9).

(See publication Words and Phrases for other judicial constructions and definitions.)

3. *Commerce*

Under the Interstate Commerce Act, once an application for reconsideration has been denied by an 'appellate division,' the Commission cannot exercise any right of review. Interstate Commerce Act, § 17(9) as amended 49 U.S.C.A. § 17(9).

4. *Commerce*

The purpose of provision in Interstate Commerce Act that when application for reconsideration of decision of division, individual Commissioner, or board shall have been denied or otherwise disposed of by the Commission or an appellate division, a suit to enforce, enjoin, suspend or set aside the decision may be brought in the district court is to require a party aggrieved by administrative action to exhaust his remedy before filing an action in the courts. Inter-

state Commerce Act, § 17(9) as amended 49 U.S.C.A. § 17(9).

5. *Commerce*

Congress never intended that the Interstate Commerce Commission should review a matter once it was decided by an appellate division to which the Commission had referred it. Interstate Commerce Act, § 17 as amended 49 U.S.C.A. § 17."

As stated in the Transamerican Freight Lines Case, supra:

"* * * But once the Commission has referred the matter to an appellate division and the latter has spoken, under the statute that is the end of the matter so far as the Commission is concerned. Any review of the decision thereafter can only be had in Court."

The described rules prescribed in *Ex Parte 67* are procedural rules. The Courts have universally and consistently ruled that procedural rules are binding upon the parties to which they apply and also upon the administrators who issue them. *Service* v. *Dulles,* 354 U.S. 363, 372, 388-389; *Arcardi* v. *Shaughnessy,* 347 U.S. 260, 265; *Bridges* v. *Wixon,* 326 U.S. 135, 163; and *Coleman* v. *Brucker,* 257 Fed. 2d 661, where at page 662 it was held:

"* * * And in *Service* v. *Dulles,* 1957, 354 U.S. 363, 372, 77 S. Ct. 1152, 1157, 1 L. Ed. 2d 1403, the Court sustained Service's contention 'that the Secretary's action is subject to attack under the principles established by this Court's decision in United States ex rel *Arcardi v. Shaughnessy,* 347 U.S 260 (74 S. Ct. 499, 98 L. Ed. 681), namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that *this principle holds even when the administrative action under review is discretionary in nature.*'" (Emphasis supplied)

Likewise, in *Atwood's Transport Lines, Inc.* v. *U. S.*, 211 Fed. Supp. 168, affirmed per curiam, 373 U.S. 377, it was stated that:

> "Rules and regulations promulgated by Governmental establishments pursuant to statutory authority have the force and effect of law, and concededly are subject to same tests as statutes. * * *"

As an initial point, it may be agreed that the Commission in disposing of temporary authority applications under Section 210(a) may establish standards or policies governing disposition of such applications, either through announcements in individual cases or through establishment of standards under its rule-making powers. Moreover, we can agree that under Section 210(a) the Commission has broad discretionary powers, just as it does in the administration of a number of other sections of the Interstate Commerce Act. In the area of temporary authorities, the Commission has elected to establish standards through a rule-making proceeding. And since they have remained unamended since their effective date of July 1, 1965, the Commission is, like all others, bound by those regulations which have the force and effect of law.

In *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, the Supreme Court stated (Page 422):

> "Undoubtedly regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more. When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one 'which we will follow in exercising our licensing power,' they must be taken by those entitled to rely upon them as what they purport to be —an exercise of the delegated legislative power—

which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them. * * *"

Furthermore, the fact that the regulations prescribed by an administrative agency pertain to a "discretionary matter" does not in any way alter their binding nature. *Service* v. *Dulles,* 354 U.S. 363 (1957). See also: *Mississippi Valley Barge Company* v. *United States,* 252 F. Supp. 162 (E.D. Mo., 1966) and other cases cited above.

Recent cases for the same proposition include *Public Utilities Commission of California* v. *U. S.,* 355 U.S. 534 where at page 542 the Court said that regulations have the force of law. Likewise, to the same effect see *Paul* v. *United States,* 371 U.S. 245 at 255.

A case particularly in point relative to this matter is *Atchison, Topeka and Santa Fe Ry. Co.* v. *U. S.,* 231 Fed. Supp. 422, where it was stated:

"On the other hand, two serious problems are raised by this practice of the Commission. The first relates to the constitutional principle of separation of powers. In the absence of express constitutional provision for executive agencies with quasi-legislative and/or quasi-judicial functions, their clear constitutionality rests upon their capacity to function exclusively within the limits of each of their several personalities. It is only where there is a pretense of one personality, while in fact there is the performance of another, that the action of a regulatory agency with judicial functions becomes arbitrary, capricious and unconstitutional. The act of defending in court a judicial determination is executive and not judicial. When to perfect that defense an *ex parte* reconsideration of a judicial determination is made, such reconsideration is an executive act done in the guise of the judicial, and is arbitrary and unfair. It has long been established that even where two or even three heads of these great and

splendid multi-headed creatures of modern government perform at the same time, even where that multi-performance is acted out by the same unit or even by one individual, the performance of each head must be true to its character, and one may not act in the guise of the other."

WHEREFORE, it is prayed that the Commission vacate its order of November 5, 1968.

Dated at Portland, Oregon, November 19, 1968.

Respectfully submitted,

WILLIAM B. ADAMS
624 Pacific Building
Portland, Oregon 97204
Attorney for Protestants above named.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

MC-129908 TA

In the Matter of:

AMERICAN FARM LINES—TEMPORARY AUTHORITY APPLICATION

Verified Statement of Vincent F. Caputo

My name is Vincent F. Caputo, I am employed by the Department of Defense (DOD) as the Director for Transportation and Warehousing Policy. The duties of my position are such that I am charged with the responsibility for, among other things, the efficient and economical operation of physical distribution activities of the DOD.

This Commission has previously been advised by DOD that it has a substantial and continuing need for the services

of American Farm Lines in the transportation of general commodities, including Class A and B explosives, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washington, Arizona, California, Nevada and Utah.

The Commission, by order served 5 November 1968, reopened this proceeding "for the purpose of receiving a verified statement from the Department of Defense which shall, to the extent the national defense and security will permit disclosure, specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers." This statement is submitted in response to that order.

In discharging its responsibility for conduct of the nation's defense, the DOD must effect movement of a vast quantity of a multitude of different commodities between innumerable points and places within the United States and abroad. A substantial percentage of its total transportation requirement is for movement of diverse types of traffic between points in the states of Kentucky, Indiana, Illinois, Missouri, Louisiana, Arkansas, Texas, Kansas and Oklahoma, on the one hand, and, on the other, points in Washington, California, Arizona, Nevada and Utah. For example, in the 11 month period between 1 August 1967, and 30 June 1968, the DOD required transportation service for the movement of the following amounts of "general commodities (including Class A and B explosives)" to points in Washington, California, Arizona, Nevada and Utah:

1. 38,892,000 pounds from points in Kentucky;
2. 480,656,000 pounds from points in Indiana;
3. 173,538,000 pounds from points in Illinois;
4. 91,364,000 pounds from points in Missouri.

5. 189,312,000 pounds from points in Louisiana;

6. 18,858,000 pounds from points in Arkansas;

7. 252,844,000 pounds from points in Texas;

8. 21,482,000 pounds from points in Kansas; and

9. 190,118,000 pounds from points in Oklahoma.

Typical origins from which traffic moved in the indicated period include governmental and commercial installations located at or near such points as: St. Louis, Lake City, Sweetsprings, Hermann, Glasgow, Harrisonville, Springfield and Joplin, Missouri; McAlester, El Reno, Lawton, Oklahoma City, Miami, Southard and Tulsa, Oklahoma; Rogers, Pine Bluff, Camden and Magnolia, Arkansas; Avon, Richmond and Louisville, Kentucky; Crane, and Indianapolis, Indiana; Alton, East Alton, Granite City and Marion, Illinois; Texarkana, Amarillo, Fort Worth, Dallas, Garland, Carrollton, Longview and Karnack (Marshall), Texas; Atchison, Parsons, Wichita and Junction City, Kansas; and Doyline, Louisiana. Typical destinations to which this traffic moved include installations at or near the following points: Port Chicago, Fallbrook, San Diego, Victorville, Twenty-Nine Palms, Seal Beach, Fairfield, Merced, China Lake, Vallejo, Sacramento, Industrial City, Oakland, Herlong, Concord, Arlington, Chico, Lathrop and Susanville, California; Bellemont and Yuma, Arizona; Ogden, Salt Lake City and Warner, Utah; Fallon and Hawthorn, Nevada; and Bangor, Tacoma and Bremerton, Washington.

In the same period, DOD required service for movement of 499,968,000 pounds of "general commodities (including Class A and B explosives)" in the reverse direction. Of that total, 17,914,000 pounds moved from points in Arizona; 385,906,000 pounds from points in California; 19,528,000 pounds from points in Nevada; 54,342,000 pounds from points in Utah; and 22,278,000 pounds from points in Wash-

ington. Typical origins are: Los Angeles, Concord, Sacramento, Oakland, Lathrop, Richmond, Twenty-Nine Palms, Fairfield, El Segundo, San Bernardino, La Mirada, Vallejo, San Jose, Santa Clara, Vernon, El Monte, Herlong, Lompac, Fallbrook, Culver City, Seal Beach, Burbank, Long Beach, National City, Marysville, Oceanside, Victorville, Lyoth, Palmdale and Stockton, California; Hawthorn and Nellis Air Force Base, Nevada; Yuma, Litchfield Park, Flagstaff, Phoenix, Goodyear, Tucson and Glendale, Arizona; Bangor, Tacoma and Bremerton, Washington; and Ogden, Tooele and Dugway, Utah. These movements were destined to numerous points distributed throughout the involved midwestern, southern and southwestern states. Indicative of this is the fact that these destinations include virtually all of the points at which "westbound" traffic is originated and also includes some points at which traffic moving in the reverse direction is not originated.

As shown in the period between 1 August 1967, and 30 June 1968, the DOD required service for the movement of a total of more than 1,900,000,000 pounds of freight between the territories American Farm Lines seeks to serve. That traffic consisted of thousands of different articles and commodities. Representative items are: numerous items falling with the definition of Class A and Class B explosives; ammunition; ammunition links; non-explosive practice bombs and mines; bomb bodies and bomb body parts; aerial bomb cluster adapters; bullets or bullet cores; canisters; salvage cannon; new and used cartridge cases; coils; dummy charges; fuzes; dummy grenades; gun wads; solid or practice projectiles or rocket heads; projectile or rocket parts; empty projectile or rocket parts; electric, electronic or scientific instruments; iron or steel shot; bomb band shipping assemblies and shell shipping assemblies; shipping cans; bomb fin assemblies or rocket fin assemblies; howitzer cannons and mortars; gun barrels and/or gun mounts; machined iron and steel articles; plastic and plastic and metal combined; rocket chambers; bomb racks;

internal combustion, jet and steam engines and parts thereof; paper articles including forms, booklets and cards; small arms; hand or rifle grenades; smoke grenades; starting cartridges or fuzes; tents; paulens; life rafts; runway covers; boots; shoes; unclassified and unsegregated salvage; surplus equipment and supplies returned from overseas; military impediments; helium gas and returned empty chambers; and canned fruits, vegetables and dried fruit.

This tremendous volume of traffic that DOD must move between numerous and varying points in the involved territories is transported by rail or motor vehicle and, in extreme emergency situations, by aircraft. A part of this traffic requires that it be transported from origin to destination in the most expeditious manner possible. However, the use of aircraft is prohibitively expensive for movement of volume shipments except in the most extreme emergencies. It follows, therefore, that the availability of motor carriers that provide service over the most direct routes and in a manner that restricts time in transit to a minimum is imperative. This defense need for speed has not been met in many, many instances by the current certified motor carriers due to a number of factors, including the following:

1. The majority of all certificated motor carrier service now available to the DOD is provided upon a joint line basis. In fact, a substantial part of the certificated motor carrier service now available between major origins and destinations, in point of volume, requires participation by at least two carriers in addition to the originating. Experience has shown that where joint line service is involved, we must in some cases allow no less than 24 hours for each 300 miles in order to arrive at a "time in transit" that can be relied upon. In contrast, single line service operating over the most direct routes available, by use of "two-man driving teams" generally can be relied upon to consistently provide delivery within a

transit time computed by allowing 8 nours for each 300 "short line" miles involved.

2. Virtually all carriers currently holding authority to provide service between points in the territories involved here are "regular route" carriers. They must necessarily traverse prescribed routes which are often circuitous. Thus, even where such carriers are authorized to provide service upon a single line basis between particular origins and destinations, they are still required to operate over greater distances than would be necessary if they held "irregular route" authorizations and

3. Some "regular route" carriers utilize "single" drivers rather than "two-man driving teams". These "single" drivers operate the vehicle between established "relay" points. Further, I understand that some of these carriers do not "qualify" or license their power units in all states through which they operate. As a result, even in those instances where they hold authority for provision of single line service, it is routine for these "regular route" carriers to use a number of different power units and drivers in effecting delivery of a single shipment moving between points in the territories involved here. This situation sometimes results in delays due to such things as temporary unavailability of power equipment at relay points, unavailability of a driver for immediate movement beyond the relay points, and the myriad of other inevitable snags that seem to occur when it is necessary for shipments to be processed through a number of different terminals.

As I pointed out before, service offered by currently authorized motor carriers for the movement of DOD traffic between points in the involved territories is not generally available upon a single line irregular route basis. This has created a situation where "times in transit" required for the movement of given shipments are in excess of those dictated by the short line distances between origins and destinations. The extent to which "times in transit" experienced in use of currently certificated carriers ex-

ceed those which would be experienced if service were performed by irregular route carriers on a single line basis by use of "two-man driving teams" is clearly disclosed by the following examples:

1. Some shipments of Class A and Class B explosives moving from McAlester, Oklahoma, to Bangor, Washington, are in transit for periods varying from 6 to 11 days when use of "joint line" service is necessary. In contrast, the one carrier now holding a certificate authorizing it to provide single line service for movement of such shipments on an irregular route basis consistently effects "third morning" delivery at Bangor, Washington;

2. Shipments of empty shell cases from San Jose, California, to Doyline, Louisiana, consistently require transit times of 5 to 6 days when handled on a "joint line" basis. In contrast, delivery is made within 72 hours after dispatch of the shipment from San Jose, California, when service is provided on a single line basis by carriers using "two-man driving teams"; and

3. The only known certificated carrier service now available for movement of the various types of commodities being shipped from St. Louis, Missouri, to points throughout California is that of "regular route" carriers. In some instances service is available from this type of carrier on a single line basis while in other instances the only service available is that offered on a "joint line" basis. However, even in those instances where service is available from "regular route" carriers on a single line basis, "transit times" that could be afforded by carriers holding "single line" authority for operation over irregular routes would be little more than half that now experienced through use of "regular route" carriers.

From a Defense point of view, any transportation system which is largely comprised of carriers holding "bits and

pieces" of authority which preclude rendering of expeditious service is inherently inefficient. In addition, such a system is inefficient because it does not permit the provision of transportation service that is fully possible and practical under proven techniques. Yet, this is the precise situation that DOD has for years been forced to "live with" in its effort to efficiently and economically procure and distribute the vast quantities of various commodities, including Class A and Class B explosives, required for implementation of the nation's policies related to the national defense. This is well illustrated by the fact that to my knowledge no carrier holds authority permitting it to provide service on a single-line basis for movement of all of the involved commodities between *all* points in any one of the nine midwestern, southern and southwestern states involved in this proceeding, on the one hand, and, on the other, all points in *any* of the five involved western states. In fact, DOD has been unable to find a single carrier that is authorized to provide such service from *any* origin in *any* of the midwestern, southern and southwestern states involved here to *all* points in the state of California. The same situation prevails with respect to authority of presently certificated carriers for movement of the involved commodities in the reverse direction. In addition, no carrier to my knowledge holds authority to provide single line service, whether over circuitous routes or otherwise, for movement of all of the involved commodities from many of our major origins to many of our major destinations. The extent to which this deplorable situation exists is clearly shown by the following examples:

1. There is no known carrier authorized to transport DOD traffic in single line service from the Naval Ammunition Depot at McAlester, Oklahoma, to Port Chicago, Fallbrook, Herlong, Camp Pendleton, Ft. Ord, George Air Force Base, or Twenty-Nine Palms, California; Fallon or Hawthorn, Nevada; Tooele Air Force Base, Utah; or Bellemont, Arizona:

2. There is no known carrier authorized to transport DOD traffic in single line service from Rogers, Arkansas, to any point in California;

3. There is no known carrier authorized to provide single line service for movement of DOD traffic from either Pine Bluff or Camden, Arkansas, to any destination in California, Arizona, Nevada or Utah;

4. There is no known carrier authorized to provide single line service for movement of DOD traffic from Magnolia, Arkansas to any point in California;

5. There is no known carrier authorized to provide single line service for movement of DOD traffic from the Blue Grass Ammunition Depot, Avon, Kentucky, or from Blue Grass Activity, Richmond, Kentucky, to points in California.

6. There is no known carrier authorized to transport Class A and Class B explosives on a single line basis from Lake City Ammunition Plant, Lake City, Missouri, to points in California.

7. There is no known carrier authorized to transport DOD traffic on a single line basis from Lone Star Ammunition Plant or from the Red River Arsenal, Defense, Texas, to points in Arizona, Nevada, Utah, California or Washington;

8. There is no known carrier authorized to provide single line service from Longhorn Army Ammunition Plant, Karnack, Texas, to points in the involved western states;

9. There is no known carrier authorized to provide single line service from the Kansas Army Ammunition Plant, Parsons, Kansas, to points in the western states involved;

10. There is no known carrier authorized to provide single line service for movement of DOD traffic from

the Sacramento Army Depot, Sacramento, California, to Ft. Sill, Oklahoma, or to Ft. Riley, Kansas; and

11. There is no known carrier authorized to provide single line service for movement of DOD traffic from Twenty-Nine Palms, California, to Defense, Texas; from Sharpe Army Depot, Lathrop, California, to Ft. Sill, Oklahoma, or to Ft. Leonard Wood, Missouri; from Yuma Proving Grounds, Yuma, Arizona, to Amarillo, Texas; from Travis Air Force Base, Fairfield, California, to Crane, Indiana; from La Mirada, California, to Crane, Indiana; from San Jose or Santa Clara, California, to Pine Bluff, Arkansas, or Shreveport, Louisiana; from Vernon, California, to Pine Bluff, Arkansas; from Sierra Army Depot, Herlong, California, to Ft. Riley, Kansas, or to Lone Star Army Ammunition Plant, Defense, Texas, or to Crane Naval Ammunition Depot, Crane, Indiana; from Fallbrook, California, to Naval Ammunition Depot, McAlester, Oklahoma; from Litchfield Park, Arizona, to Longhorn Army Ammunition Plant, Karnack, Texas; from from Goodyear, Arizona, to Lexington, Kentucky; from Naval Ammunition Depot, Hawthorn, Nevada, to Naval Ammunition Depot, McAlester, Oklahoma; from Tracy Defense Depot, Lyoth, California, to Oklahoma City, Oklahoma, or to Ft. Leavenworth and Ft. Riley, Kansas; from Stockton, California, to Crane, Indiana.

DOD is charged with the total responsibility for the execution of all functions incidental or necessary to the defense of the country. It is also charged with the responsibility for conducting those functions in the most efficient and economical manner possible. However, enforced reliance upon motor carrier service available from presently certificated carriers for movement of vast quantities of freight, comprised of "general commodities (including Class A and B explosives)", between points in territories

involved here has effectively subverted efforts to establish the most economical and efficient distribution system possible. This is evident, as I previously pointed out, from the fact that unduly excessive "times in transit" are experienced in the movement of this traffic by use of the currently authorized carriers. I might also point out that this results in higher cost to the taxpayers.

The fact that there is a paucity of expedited service available from presently authorized carriers is, in and of itself, ample proof that the additional service which American Farm Lines seeks authority to provide is necessary *to assure that the Government's reasonable transportation requirements* are met. In addition, I feel that the quantity of freight which DOD must regularly move between the involved areas is so vast that the need for the grant of authority sought is beyond question.

In many instances it is necessary to closely coordinate the arrival of inbound shipments with production schedules of manufacturing installations. For example, production at the Louisiana Army Ammunition Depot, Doyline, Louisiana, and at the Pine Bluff Arsenal, Pine Bluff, Arkansas, is dependent upon coordinated arrival of inbound materials. This is true because neither of these installations warehouse some types of ammunition produced at those points and incoming shipments of such items as empty shell cases are fed into the production line directly from the delivery vehicle. Accordingly, it is imperative that such inbound shipments arrive at the time expected. In addition, production of the shell cases at San Jose, California, is such that it is impossible to gear shipments from that point to Doyline and Pine Bluff so as to "accommodate" them to the excessive and widely varying transit times which result from use of most presently available "joint-line" services of regular route carriers. Every possible "routing" has been used for movement of these shipments. However, only one of the currently certificated common

carriers on occasion has proven able to provide the "timed" delivery necessary to efficient operation of production facilities located at such points as Doyline, Louisiana, and that carrier alone does not have the capacity to move the tremendous volume required. This situation exists even though those carriers were specifically made aware of the fact that the "timed" delivery requested was essential to the national defense effort. Under these circumstances, there is no doubt but that the continued existence of situations of the type just described clearly shows that the Government has a substantial requirement for provision of expedited service of a type which "regular route" carriers are not now providing.

A substantial segment of the involved traffic consists of movements to air bases and port installations for transshipment beyond the continental limits of the United States. When shipments are assigned to specified vessels or aircraft for transshipment, it is imperative that they arrive at destination on a planned basis before the scheduled ship loading or airlift date. Nevertheless, the DOD has experienced situations where shipments routed via currently certificated carriers fail to arrive at destination in time for the scheduled transshipment. This occurs even though shipments are loaded at interior origin points sufficiently in advance of the scheduled transshipment date to allow for the transit times normally required by the particular carriers involved. A concrete example of this type of difficulty experienced in use of presently authorized carriers lies in the fact that failure of certificated carriers to provide promised three-day transit time on shipments from St. Louis, Missouri, to San Francisco, California, has resulted in shipments arriving at destination after ships which were scheduled to move the traffic overseas had departed. There can be no question whatever but that the existence of service failures of this type are themselves sufficient to require that additional motor carrier service be made available for movement of DOD traffic.

It is at times desirable to formulate truckload shipments which are composed in part of Class A and Class B explosives and in part of various other types of commodities that are normally referred to as "freight all kinds". However, it is many times impossible to ship in this fashion because carriers that hold authority for transportation of "general commodities" often do not hold co-extensive authority for transportation of Class A and Class B explosives. The inherent inadequacy in service that can be offered by carriers whose authority is "hamstrung" in this fashion is obvious.

As has been demonstrated, the type of service which can be provided by currently certificated carriers often does not meet DOD's transportation requirements for movement of traffic that requires expedited movement and precisely timed delivery. However, until recently DOD had no practical choice but to rely entirely upon that service. That situation changed in the latter part of 1966 when a number of cooperative agricultural associations, including American Farm Lines, made themselves known to DOD and began soliciting its traffic for movement pursuant to the exemption from economic regulation provided by Section 203(b)(5) of the Interstate Commerce Act. In due course, DOD began using the service offered by American Farm Lines for movement of Class A and Class B explosives and for movement of "general commodities" between various points in Kentucky, Illinois, Indiana, Missouri, Arkansas, Louisiana, Texas, Kansas and Oklahoma, on the one hand, and, on the other, various points in California, Arizona, Nevada and Utah and other states.

It was immediately discovered that the service of American Farm Lines was superior to that available from presently certificated motor carriers because its service was invariably provided by use of "two-man driving teams" operating over the most direct routes possible from origin to destinations and which was available between any and all points in broad multi-state territories.

The completely flexible and highly expedited service offered by American Farm Lines was used with ever increasing frequency throughout 1967 and the first several weeks of 1968. This was due to the fact that American Farm Lines was an organization whose service was capable of meeting DOD's accelerating need for such regularly required transportation niceties as precisely "timed deliveries" and absolute minimization of time in transit. Thus, American Farm Lines transported a total of 74,155,685 pounds in the period between December 1966 and 30 June 1968. In every instance the service provided was excellent and met DOD service requirements.

Service provided by American Farm Lines is used to complement rather than to replace service available from certificated motor carriers and collectively these services have proven adequate to meet the Government's transportation requirements. Accordingly, DOD now relies upon the availability of its expedited and flexible service as well as the more rigid service available from certificated carriers in the movement of DOD traffic. The use of service provided by American Farm Lines has proven most beneficial. Examples of this include:

1. On 30 August 1968, the DOD shipped 22 truckloads of small arms ammunition from Lake City, Missouri, to Port Chicago, California, for export. The defense requirement was for this shipment to move "intact" which is to say, departing on the same day and arriving on the same day. A further requirment was for arrival on or before 30 September 1968. No regulated carrier serving that base could provide the equipment needed and effect delivery within the required time. This shipment was delivered on 2 September 1968, within the requirement, by American Farm Lines;
2. On 3 May 1968, the DOD shipped special test items from Camden, Arkansas, to U.S. Army Proving Ground, Dugway, Utah. The defense requirement was for arrival before 7:00 A.M., 6 May 1968. American

Farm Lines delivered the shipment on 5 May 1968. The certificated carriers serving Camden to Dugway would have required three participating carriers, and, based upon our experience, would not have complied with the desired date of delivery;

3. American Farm Lines was called to deliver a shipment of Chemical Agent O and riot control agent from Fort Estill, Kentucky, to Travis Air Force Base, California, for airlift beyond. The requirement was for pickup on 3 October 1967, for connection with airlift no later than 7 October 1967. It was delivered 6 October 1967. American Farm Lines provides the only direct line service to our knowledge and, based upon our experience, the requirement could not have been met by interline carriers;

4. On 5 March 1968, "freight of all kinds" was picked up by American Farm Lines from Pine Bluff Arsenal, Arkansas, and delivered to Hill Air Force Base, Utah. The defense requirement was for delivery on 7 March 1968. It was delivered on that date for a two-day transit time. American Farm Lines provides the only direct service between these points. Our experience shows that no interline routing through certificated carriers could have effected delivery within the required time; and

5. On 20 April 1967, "freight of all kinds" was shipped from Edwardsville, Illinois, to Naval Weapons Station, Vallejo, California. The defense requirement was for delivery on Sunday, 23 April 1967, and was delivered on that date by American Farm Lines which provides the only direct line service between these points. Our experience shows that no interline carrier could have met the requirement.

Injunctions issued by the United States District Court for the Western District of Oklahoma now precludes American Farm Lines from rendering much of the completely flexible service previously provided. In addition, recently

enacted legislation will limit even more drastically the ability of American Farm Lines to provide fully flexible service in the future.

In the opinion of the DOD, grant of the authority sought by American Farm Lines would not adversely affect existing carriers to any material extent. Conversely, grant of its application for temporary authority would merely permit American Farm Lines to provide, on a certificated basis, the same service that it provided upon an "exempt" basis prior to 21 February 1968, and would be most beneficial to DOD in the discharge of its responsibility for conduct of the national defense.

As I have tried to make clear, the DOD has a substantial and continuing need for the service proposed in this proceeding. To this end it has already advised the Commission of its support for comparable permanent authority. In addition, this Commission is urged to promptly grant the instant application for temporary authority in order that the DOD can continue to receive the service that it was receiving prior to the injunction issued against American Farm Lines.

VERIFICATION

COUNTY OF ..... } ss:
STATE OF ..... }

Vincent F. Caputo, being duly sworn, deposes and says that he has read the foregoing statement and knows the content thereof; and that the same are true as stated.

.....
Vincent F. Caputo

Subscribed and sworn to before me, a notary public, in the county and state aforesaid, this.....day of..... 1968.

.....
Notary Public

My commission expires.....

BEFORE THE
INTERSTATE COMMERCE COMMISSION

DOCKET No. MC-129908 TA

AMERICAN FARM LINES

Statement of American Trucking Associations, Inc. in Response To Verified Statement Submitted by DoD

Comes now American Trucking Associations, Inc. (ATA), and files this statement in reply to the verified statement submitted by the Department of Defense (DoD) in support of the above-entitled application.

I

In its order entered herein on November 5, 1968, Division 1 provided that on or before November 20, 1968, applicant submit a verified statement from DoD specifying a need for the proposed service. Protestants, by virtue of an extension of time granted by the Commission, may submit verified statements in response to any statement submitted by applicant on or before December 13, 1968. Because of ATA's association status, we are unable literally to comply with the Commission's order by submitting verified statements setting forth affirmative evidence in reply to DoD's statement. Such evidence can be submitted only by protestant motor carriers. This statement is intended to deal primarily with the failure of DoD's verified statement to comply with the evidentiary requirements set forth in the Commission's order and, concomitantly, the failure of applicant to establish a need for the proposed service.

II

DoD's Verified Statement Does Not Specify the Commodities or Points for Which There Is an Immediate and Urgent Need for Applicant's Proposed Service

Between August 1, 1967 and June 30, 1968, DoD allegedly required service for the movement of approximately 1,457,064,000 pounds of traffic from points in the involved midwestern, southern and southwestern States to points in California, Arizona, Utah, Nevada, and Washington. Typical origins were represented as including three points in Kentucky, two points in Indiana, four points in Illinois, eight points in Missouri, a single point in Louisiana, four points in Arkansas, eight points in Kansas, and seven points in Oklahoma. Typical destinations to which that traffic moved consisted of 19 points in California, two points in Arizona, three points in Utah, two points in Nevada, and three points in Washington. During the same period, about 499,968,000 pounds of traffic moved in the reverse direction. Origins from which this traffic was transported included 30 points in California, seven points in Arizona, three points in Utah, two points in Nevada, and three points in Washington. The destinations to which this traffic moved were represented as including "virtually" all of the above-described points from which its westbound traffic originated, as well as some additional but unnamed points in the involved area. (pp. 2-5)[1]

The more than 1,900,000,000 pounds of traffic transported during the above-specified period allegedly included "thousands of different articles and commodities." (p. 5) The commodities were described as consisting of "numerous items falling within the definition of Class A and Class B explosives," and about 75 specified individual and class commodities, comprised primarily of military equipment and supplies. (pp. 5-6)

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[1] "P" refers to page of DoD's verified statement.

Presently, DoD's traffic is transported by rail, motor vehicle, and, in emergency situations, by aircraft. (p. 6) However, it is not clear what percentage of the traffic is moved by the various modes. It would appear that the sole concern of DoD in this proceeding refers to that portion of its traffic which requires "expeditious handling." (p. 6) Past experience with the use of air service on volume shipments has shown its cost to be prohibitive, and therefore, DoD believes that there is an imperative need for motor carriers capable of providing direct service with a minimum amount of transit time. (p. 6)

At the outset, we wish to point out that the Commission's order of November 5, 1968, requires that DoD's verified statement "specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers." We submit that DoD's verified statement totally fails to set forth the specific evidence required by said order or the Commission's Temporary Authority Rules.

Although information has been supplied about traffic moving between various points in the involved territory over an 11-month period, DoD has indicated that only an unspecified portion of that traffic requires expeditious handling, which traffic apparently constitutes the basis of DoD's support of the instant application. Therefore, the Commission is still without any information as to the *volume* of traffic to which this application pertains. Also, while the verified statement sets forth a list of commodities which DoD transports, there is no specific indication of which commodities, if any, require expedited service. Additionally, even though typical points[2] in the involved territory are set forth, it is apparent that those

[2] We submit that even if it was demonstrated that service was needed between the typical origins and destinations listed by DoD in its statement, they would not comprise a representative number of points within the 14 States sought in this application, and, therefore, would not justify a grant of the broad territorial authority in this proceeding.

points refer to the origins and destinations of DoD's general traffic, and not solely to that portion of its traffic which allegedly needs expeditious service. Therefore, those points cannot be considered as evidence justifying the broad grant of authority sought herein.

In light of the foregoing, we submit that DoD has not provided specific information as to the commodities or points between which it has an immediate transportation need, as was required by the Commission's order, and, further, that the statement does not conform with the minimum evidentiary requirements as set forth in 49 C.F.R. § 1131.2(c).

III

DoD Has Failed To Demonstrate the Inadequacy of Existing Services

A. *It Has Not Been Shown That Existing Joint-Line Services Have Failed or Are Unable To Meet DoD's Transportation Needs*

DoD alleges that the "majority" of all certificated motor carrier service presently available to it is provided upon a joint-line basis, and that such service requires excessive transit times. (p. 7) Therefore, joint-line service is not considered responsive to its need for expedited handling of its traffic. However, in support of this generalized allegation, DoD cites only two instances of unsatisfactory service resulting from the use of unnamed joint-line carriers. The first relates to the movement of "some" shipments of Class A and Class B explosives moving from McAlester, Okla., to Bangor, Wash. The second complaint concerns the shipment of empty shell cases from San Jose, Calif., to Doyline, La. (pp. 9-10) In each instance joint-line service was deemed inadequate when compared to the expeditious service provided by *existing single-line carriers* operating between those points. Thus, even assuming, *arguendo,* that existing joint-line

service between the named points is unsatisfactory, it is apparent that satisfactory single-line service is available for those shipments.

It is also alleged that no single-line service is available to DoD from about 28 specified points to a number of destinations in the involved territory. (pp. 12-14) Nevertheless, DoD has not demonstrated that existing joint-line services between those points are unsatisfactory, or that any of its traffic between those points requires expeditious handling.

We do not believe that the generalized and indefinite complaints about the services of unnamed joint-line carriers could, under any stretch of the imagination, be considered material to the issue of the adequacy of those services. In fact, the Commission, in 49 C.F.R. § 1131.4 (b)(6), has provided:

> Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. *A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable, immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.* (Emphasis supplied)

We submit that DoD's statement, without evidence of demonstrated service deficiencies, falls far short of *clearly establishing* that existing joint-line carriers are not capable of, or have failed in, meeting the reasonable, immediate and urgent needs of DoD. At most, its statement merely establishes that it has a preference for single-line service in lieu of existing joint-line service. The Temporary Authority Rules explicitly provide that such preference will not warrant a grant of temporary authority.

B. *Regular-Route Service Has Not Been Shown To Be Unresponsive to Shipper's Needs*

According to DoD, *virtually* all carriers presently providing service between points in the involved territory conduct regular-route operations. This service is deemed less desirable than irregular-route service because the former requires operation over prescribed routes which are often circuitous, whereas the latter enables the provision of service on a direct basis between various points. (pp. 7-8)

It is well settled that mere circuity, in and of itself, is no indication of the unsatisfactory nature of existing service, unless it is shown that the complained-of service is so unduly circuitous as to be inadequate to meet shipper's reasonable transportation needs. DoD's statement does not provide any information as to points between which the services of named regular-route carriers are so circuitous as to be inadequate. The only information provided raises a general complaint about regular-route service available between St. Louis, Mo. and points in California. DoO alleges that in some instances such service is provided on a joint-line basis whereas at other times a single-line service is provided. However, regardless of which of those services is available, DoD believes that irregular-route, single-line service would require about half of the transit time presently required by regular-route carriers. (p. 10) This unsupported and self-serving statement can hardly be considered indicative of any service deficiencies experienced by DoD between the above-described points.

Another aspect of regular-route service deemed inadequate is the use by some unidentified carriers of "single" drivers rather than "two-man driving teams." (p. 8) Supposedly, the single drivers operate through established relay points, and, therefore, the power units must be interchanged at various points. This results in "snags" due to the unavailability of power units or drivers. (p. 8)

Although the Temporary Authority Rules provide for the granting of temporary authority when existing authorized carriers are unable or refuse to furnish equipment in order to meet an immediate and urgent need (49 C.F.R. § 1131.4(b)(6)), this clearly is not the case here. DoD has not indicated a single carrier which has refused or was unable to furnish equipment when requested, nor have occasions been set forth on which connecting drivers could not be obtained. Thus, the "snags" alleged to exist when single drivers are used appear to have no basis in fact. Moreover, DoD has not even identified the carriers, if any, which utilize such operations.

C. *DoD Has Not Established That It Requires a Service Which Existing Services Cannot Collectively Provide*

DoD believes that a transportation system which is comprised of carriers holding "bits and pieces" of authority is inherently inefficient. (p. 10) It alleges that no carrier holds authority to provide the complete transportation service needed in the 14-State area. (pp. 10-12)

The Commission has prescribed definite standards which an applicant must meet in order to warrant a grant of temporary authority in the above-described circumstances. Section 1131.4(b)(5) of 49 C.F.R. provides:

> Requests for temporary authority on the basis of "providing a complete service to a shipper," even though existing carriers are participating in the traffic and in many instances can provide a substantial part of the service, require *special justification.* Generally, in such instances, the *applicant must establish with reasonable certainty that the existing carriers cannot adequate serve the shipper in their authorized territories,* or that the supporting shipper has revised its distribution methods to such an extent that there actually is an immediate and urgent need for the complete service proposed. (Emphasis supplied)

As has been pointed out above, DoD has not justified the scope of the commodities it allegedly requires nor the broad territory in which it seeks applicant's service. Also, it has not been shown that existing services are unable to meet any need which might exist. There are over 110 motor carriers offering a wide diversity of service protesting this application, and not one service failure has been attributed to any of those carriers in DoD's statement. Thus, we submit that there is no evidence of record which would establish with reasonable certainty that existing carriers cannot adequately serve the shipper in their authorized territories. The absence of such "special justification" precludes a grant of temporary authority in this proceeding.

IV

DoD's Verified Statement Does Not Establish an Immediate and Urgent Need for the Service Proposed

DoD premises its support of the instant application upon an alleged need for expedited service. It alleges that its efforts to secure the most efficient and economical transportation available is subverted by the unduly excessive transit times experienced with presently certificated carriers.

We submit that the foregoing allegations do not demonstrate the need required to be established in order to warrant a grant of temporary authority. As provided in section 1131.4(b)(2) of the Commission's Temporary Authority Rules:

> An immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of distribution, new or unusual commodi-

ties, an origin or destination not presently served by carriers, a discontinuance of existing service, failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application can be filed and processed.

We do not believe that any of the reasons set forth by DoD fall within the ambit of the situations which constitute the proper subject matter for a temporary authority application.

In effect, DoD urges that the Commission grant American Farm Lines the authority sought because such operation would ensure the movement of its traffic in the most efficient and economical manner possible. What it essentially seeks is an ideal transportation system wherein it has direct, single-line service for all of its commodities and between all of the points through which its traffic moves. Certainly, this is the situation every shipper desires. However, the realities of transportation and the diverse needs of thousands of shippers prevent the institution of such an impossible and impracticable system. DoD's alleged need for expedited service because of the "defense requirement"—whatever that vague term may mean—relies upon its unsupported allegations of the inadequacy of joint-line service, the need for a complete service, and the failure of "some" carriers to use two-man driving teams. As has been pointed out above, DoD has not complained of the services of identified carriers, protestants herein or not, or of specific instances in which the complained-of deficiencies resulted in service failures or delays. Moreover, it has not shown that any of the involved origins or destination do not have carrier service available, or that any carrier presently authorized to serve those points has failed to provide service. Therefore, we do not believe that DoD has demonstrated "an immediate and urgent need" for service as defined in 49 C.F.R. § 1131.4(b)(2).

Two aspects of DoD's alleged service problems require further comment. It is asserted that there is a need for expedited service in order to guarantee the coordination of the arrival of inbound shipments with the production schedules of various manufacturing facilities. (p. 15) These timed deliveries are needed at the Louisiana Ammunition Depot at Doyline, La. and the Pine Bluff Arsenal at Pine Bluff, Ark. as neither of these facilities warehouse some types of ammunition and the incoming shipments of empty shell cases are directly fed into the production lines from the delivering vehicle. (p. 16) Inbound shipments of shell cases from San Jose, Calif. to those facilities cannot be timed due to the transit times required by joint-line, regular-route carriers. Only one carrier allegedly provides satisfactory service between San Jose and Doyline at present, but that carrier does not have "the capacity to move the tremendous volume required." (p. 16)

Initially, we would point out that there is no evidence of record indicating the actual volume of traffic moving between San Jose and Doyline or Pine Bluff. Therefore, it has not been shown that the "one" carrier providing satisfactory service cannot handle all of the traffic involved. Also, DoD has previously indicated that there are *carriers* providing 72-hour, single-line service on shell cases from San Jose to Doyline. (pp. 9-10) No information has been provided as to late deliveries or other unsatisfactory service between San Jose and Pine Bluff. Thus, it does not appear that there is an concrete evidence tending to establish "an immediate and urgent need" for timed deliveries to Doyline or Pine Bluff, nor between any of the other points sought in the application.

Another "example" of unsatisfactory service involves the need for the timely delivery of shipments by common carriers to ports for ultimate delivery overseas. It is alleged that due to the failure of existing carriers to meet scheduled delivery times, shipments have not reached the

docks until after the ship has departed. This service failure has been encountered on movements from St. Louis, Mo. to San Francisco, Calif., and is attributed to the failure of presently authorized carriers to provide a three-day service. (p. 17) DoD's statement does not specify the frequency of these service failures, the carriers involved, nor the extent to which an "immediate and urgent need" exists for such service. It is well settled that a general allegation of the inadequacy of presently certificated carriers, without more, is not sufficient to warrant a grant of temporary authority.

The "desirability" of moving mixed shipments is also urged as a reason for granting this application. (p. 17) Such service allegedly is not now available because carriers holding general commodity authority do not also hold authority for the transportation of Classes A and B explosives. (p. 18) However, DoD has nowhere established that it requires the movement of "mixed" shipments between the points involved in this proceeding, or that existing carriers have specifically failed or been unable to provide such service when requested to do so. In the absence of such showing, the Temporary Authority Rules preclude the granting of this application. (49 C.F.R. § 1131.2(c))

Conclusion

DoD, despite its general allegations of unsatisfactory service throughout the involved territory, has not presented a scintilla of evidence demonstrating that it has an immediate transportation need for the proposed service, nor has it set forth concrete and specific examples establishing that identified existing services are inadequate in either their capacity or demonstrated ability to perform the services requested herein. Therefore, we submit that DoD's verified statement fails to set forth the information specifically required by the Commission's order of November

5, 1968, and does not comply with the minimum evidentiary requirements of the Temporary Authority Rules. For these reasons, we do not believe that applicant has established an immediate and urgent need for all or any part of the service proposed herein which cannot be met by existing services. Thus, we urge that, upon reconsideration, the application be denied.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.

PETER T. BEARDSLEY
RICHARD A. MEHLEY
NELSON J. COONEY
JOHN R. BAGILEO
Attorneys

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-129908 TA

In the Matter of the Application of:

AMERICAN FARM LINES

RESPONSE OF ASHWORTH TRANSFER, INC. TO VERIFIED STATEMENT OF VINCENT F. CAPUTO SERVED UNDER DATE OF NOVEMBER 20, 1968

INCLUDING:

(a) VERIFIED STATEMENT OF DONALD CULBERTSON ON BEHALF OF ASHWORTH TRANSFER, INC.

(b) ARGUMENT

KEITH E. TAYLOR and
GORDON L. ROBERTS
OF AND FOR
PARSONS, BEHLE, EVANS & LATIMER
520 Kearns Building
Salt Lake City, Utah, 84101

Attorneys for Protestant,
Ashworth Transfer, Inc.

Dated: December 11, 1968

Date Due: December 13, 1968

Ashworth Transfer, Inc., a Protestant in the above-captioned proceeding, herewith files its response to the Verified Statement filed by the Applicant under date of November 20, 1968.

Preliminary Statement

Protestant Ashworth has previously filed herein its protest against the grant of the instant application. It incorporates herein the statements contained in said protest.

Further, under date of November 21, 1968, Ashworth filed a Motion to Vacate the Order of the Commission,

through Division 1, of November 5, 1968 which allowed the filing of verified statements by the Department of Defense and by the various Protestants herein. By filing the instant response, including the Verified Statement contained herein, Protestant Ashworth does not waive or depart from the contentions made in its Motion to Vacate served under date of November 21, 1968. Nonetheless, since the Commission has not as yet ruled upon the motion of Ashworth to vacate or upon similar motions filed by other Protestants in this proceeding, and the due date for the instant pleading is now at hand, this pleading is filed with the reservation that it is still the contention of Protestant Ashworth that the proceeding is not properly constituted and not authorized by the applicable regulations and statutes pertaining to the Commission's jurisdiction and procedures in such matters.

Verified Statement of Donald H. Culbertson

1. My name is Donald H. Culbertson and I am employed by Protestant Ashworth Transfer, Inc. as Traffic Manager. As such, I have knowledge as to the facts stated in this Verified Statement and am authorized by Ashworth to make this statement on its behalf. I am familiar with the authority of the Company, its equipment, and its operations, including those of serving the Department of Defense in the transportation of explosives.

2. A copy of the operating authority of Ashworth and of Hawkes Transportation Co., Inc. were attached to the protest which we originally filed in this proceeding. Since that time, there has been one relevant change in such authority which should be noted: Pursuant to an order by the Commission in Docket No. MC-F-10100, control of Hawkes Transportation Co., Inc. by Ashworth has been authorized. As a result thereof, although no new Sub number has yet been issued, Ashworth is authorized to operate pursuant to the authority previously held by Hawkes Transportation Co., Inc. A copy of the Hawkes

authority was attached to the original protest filed herein by Ashworth and Hawkes jointly.

3. Ashworth has a tremendous interest in the instant application. During the period of the last two years approximately, Ashworth has become increasingly engaged in the transportation of explosives for the Department of Defense. As will be noted by reference to its authority, attached to the protest herein, Ashworth has been both specific explosives authority and authority to transport size and weight commodities. Many of the explosives transported by the Department of Defense can be moved under size and weight authority.

As set forth in the protest filed previously by Ashworth, a substantial portion of our participation in this traffic is in interline service. The interline nature of the explosives movements does not cause any delay whatsoever. The interline arrangements with connecting carriers are facilitated and expedited through modern communication techniques, the inspection time required at point of interchange is minimal, and we have had no complaints from the Department of Defense with respect to the interline nature of the moves in which we have participated. Much of the traffic with which we are involved is interchanged with connecting carriers at Denver. Such traffic would be from various of the states sought by the Applicant, including Indiana, Illinois, Louisiana and Kansas. Such traffic is destined to various points in Washington, California, Nevada and Arizona. From Denver, we can move the explosives to Washington in single-line service under the Ashworth-Hawkes authority combination. Traffic moving to California is interlined with various carriers with interchange points normally at Las Vegas, Wells or Reno, Nevada.

The interline connections do not require circuitous routing and, in fact, interchange is normally accomplished at some point along the most direct route between the point

of interchange at Denver and the place of delivery. We have previously listed numerous of the carriers with whom we interline this explosives traffic. I note that one carrier omitted from the protest was Wells Cargo, Inc. which is our connecting carrier for much of the traffic moving to points in California. As will be seen from a review of Ashworth's authority, it is irregular route authority with no restrictions which cause circuitous routings.

4. I have noted what the supporting shipper states with respect to its requirements for rushed service in order to meet departing ships from the West Coast. Ashworth has regularly been called upon by the Government to participate in movement of explosives to meet schedules such as these. It provides the equipment and service necessary to comply with the time limitations on such shipments. For example, it regularly utilizes two-man sleeper cab service to provide for the movement of vehicles without interruption and, as noted, it is authorized to travel over irregular routes. One recurring problem which is possibly the explanation for some of the problems mentioned by the supporting shipper is the fact that there has been and continues to be a tremendous delay in the unloading of movements of explosives at the destination points in such places as Port Chicago, California and Bangor, Washington. In the past several months, unloading time at these points of destination has been anywhere from five to seven, and in some instances, to ten days. This means that there is a substantial backup of loaded trailers, sitting at points of destination such as Port Chicago or Bangor which cannot be utilized until unloaded. At given times, we have had as many as from 40 to 60 forty-foot van trailers tied up because of such delay in unloading. Thus, no matter how expeditious the transportation services and transit time are, the effect of the same is lost because of the delay in unloading the trailers. We most emphatically submit, therefore, that the entrance of new carrier service will in no way remedy the problems which the Department of Defense alleges exist with respect to transit time.

5. Based upon my knowledge of Ashworth's operations and the operations of our interlining carriers and competing carriers in the field of the movement of explosives for the Department of Defense, I feel safe in stating that the common carriers, presently authorized, have promptly and efficiently responded to the needs of the Department of Defense in the movement of explosives in connection with the current effort in Southeast Asia. New equipment has been obtained by these carriers to facilitate and expedite such explosives traffic. For example, Ashworth alone has placed at least 20 new forty-foot van trailers in operation over the past several months, most of which are necessitated by and are being used in the transportation of explosives for the Department of Defense. A substantial portion of our business is presently devoted to the movement of explosives for the Department of Defense in areas which would be devoted by the grant of the instant application. The competition for this explosives traffic is presently very keen and we see no need whatsoever for the entrance of an additional carrier which, because of the broad scope of the rights which it seeks, would undoubtedly divert tremendous volumes of traffic from this Protestant and from other carriers.

6. Particularly do we feel this application should be denied inasmuch as the Department of Defense in its most recent support letter, and in the letter filed at the time of the original application by American Farm Lines, has not specified any specific failure on the part of this Protestant or other authorized carriers with respect to the movement of the subject commodities. It is my belief that the reason that there has been no such specification is that, in fact, this Protestant and other presently authorized carriers are efficiently and expeditiously meeting the needs of the Department of Defense in the movement of explosives.

/s/ Donald H. Culbertson
Donald H. Culbertson

STATE OF UTAH
County of Salt Lake } ss:

DONALD H. CULBERTSON, being first duly sworn, deposes and says: That he has read the foregoing statement, knows the contents thereof and that the same are true as stated.

/s/ DONALD H. CULBERTSON
Donald H. Culbertson

Subscribed and sworn to before me this 11th day of December, 1968.

/s/ LANA A. ROGERS
Notary Public, residing at
Salt Lake City, Utah

My Commission Expires:
Nov. 5, 1971

Argument

Protestant Ashworth takes the further position that the verified statement filed on behalf of the Department of Defense, pursuant to the Order of November 5, 1968 of Division 1, even coupled with the data previously filed by the Department of Defense, is fatally deficient when compared to the requirements of the Commission's Regulations. Under Ex Parte No. 67, the Commission has required that statements in support of temporary authority applications must contain at least certain specific information. Several of the categories of required information, which have not been complied with by the Department of Defense in the instant case are:

a) The volume of traffic involved, frequency of movements, and how transported now and in the past.

b) Efforts which have been made to obtain the services from existing carriers.

c) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for their refusal.

d) Support of similar applications and the determination of such applications.

When the Department of Defense has failed, even after having been given a second opportunity, to comply with the regulations of this Commission, we submit that such is the best evidence of the lack of any real need for new carrier services herein. In view of the history of the instant application, and specifically the injunction which has been issued by the United States District Court for the District of Washington, we submit that compliance with the Commission's Regulations is mandatory and failure to comply with such Regulations is fatal to any application for temporary authority. No claim has been made by the Department of Defense that any of the requisite information was not forwarded for security reasons. Indeed, it would be frivolous to allege, for example, that the names and addresses of existing carriers who have failed to provide the service required would in any way be confidential for security reasons. The same is true as to the identity and discussion of other similar applications supported by the Department of Defense.

We would further note, in passing, that the supporting data filed by the Department of Defense seemingly ignores several other aspects of the Regulations pertaining to temporary authority. For example, the application seeks service to or from a number of states, without any concomitant proof as to movements between a representative number of points in said states. The support of the shipper is based largely upon the consideration of the preference of single-line over interline service which the Regulations specifically provide will not be considered as the grounds for a grant of temporary authority, at least in the absence of a specific showing that there is no available carrier service capable of meeting the reasonable needs of the shipper. The matter of expense so far as the present system is concerned as compared to that pro-

posed by Applicant is essentially irrelevant since no allegation has been made, and none could be sustained, that the present rate structure of Protestant or other carriers constitutes an embargo against the transportation of the subject commodities. Indeed, the tremendous volumes of explosives presently being moved within the requirements of the Department of Defense clearly demonstrates that there is no embargo whatsoever but, rather, a responsive effort on the part of presently authorized carriers to fulfill the reasonable needs of the Department of Defense.

WHEREFORE, Protestant Ashworth respectfully moves that the application should be denied. In so moving, however, Ashworth reserves the position stated in its Motion to Vacate, filed previously herein, to the effect that this proceeding is procedurally and jurisdictionally improper in its present context.

Respectfully submitted,

/s/ KEITH E. TAYLOR
Keith E. Taylor
/s/ GORDON L. ROBERTS
Gordon L. Roberts
of and for
PARSONS, BEHLE, EVANS & LATIMER
520 Kearns Building
Salt Lake City, Utah 84101
Attorneys for Protestant, Ashworth Transfer, Inc.

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. MC 129908 TA

AMERICAN FARM LINES

Reply of Bekins Van Lines Co., Capitol Truck Line, Inc., and Lyon Van Lines, Inc. to Applicant's Petition For Reconsideration

Come now Bekins Van Lines Co., Capitol Truck Line, Inc., and Lyon Van Lines, Inc., protestants herein, and for their reply to applicant's petition for reconsideration in the above-captioned application of the Order of the Commission, Temporary Authorities Board, dated July 12, 1968, denying said application, respectfully allege as follows:

By the above-captioned application temporary authority of 180 days' duration is sought to engage in the following transportation:

> "*General commodities including classes A and B explosives,* restricted to traffic moving on Government Bill of Lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, and Arizona."

Protestants timely filed their protest to this new service proposal and in the course thereof set forth their interest in said application as involving the transportation of household goods and so-called cryogenic liquids, throughout the proposed 13 state service territory. They expressed their position that in light of the present existence of their respective authorities, facilities and equipment, there exists no immediate or urgent need for the proposed new service, insofar as it would duplicate their own.

A reply was thereafter filed by applicant to such protest and to the protests of numerous additional carriers. No-

where within the contents of said reply or of the instant petition was there contained any expression of an attempted justification for the sought authority insofar as it embraces the two identified commodities of concern to these protestants and we respectfully submit that the Commission should infer therefrom that applicant has, in fact, abandoned its application insofar as the same embraces such commodities. Enforcing such position is the fact that applicant has now filed a permanent authority application wherein its general commodity transportation proposal is specifically restricted against the transportation of household goods and commodities in bulk.

Under the foregoing circumstances, protestants respectfully submit that applicant has in fact tacitedly admitted the lack of need for its proposed service insofar as the same embraces such commodities and accordingly the application at least to that extent should be summarily denied.

Respectfully submitted,

WARREN N. GROSSMAN
Warren N. Grossman

BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET MC-129908, TA

AMERICAN FARM LINES TEMPORARY
AUTHORITY APPLICATION

STATE OF WASHINGTON
COUNTY OF KING } ss.

I, Forrest Arnold, being first duly sworn, depose on my oath and say:

I am Traffic Manager of Black Ball Freight Service, a protestant herein. I have personal knowledge of the following matters and things relating to the application.

That the fact hereinafter set forth are in addition to that contained in my company's protest to the application.

That for more than the past twenty-five years Black Ball Freight Service has participated in the transportation of general commodities, including Classes A and B explosives moving on Government bill of lading between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and on the other, points in Clallam, Jefferson, Kitsap and Mason Counties, Washington. That my company derives approximately 24 percent of its total revenue from interlining said traffic at Seattle or Tacoma, Washington. That during the past year my company interlined in excess of 62,000,000 pounds of traffic moving between the above described points on Government bills of lading. That such traffic is necessary for the maintenance of my company's operations in that during 1967 our operating ratio (percentage of total expenses to total revenue) was 94.8. That the exclusion of 24 percent of our total revenue would put our company in a loss position. That our participation in the subject traffic consists of being the delivering or originating carrier on traffic moving between points in Clallam, Jefferson, Kitsap and Mason Counties, Washington, and States enumerated above, with interline with other carriers at Seattle or Tacoma, Washington. The equipment of the connecting carrier moves through with our company performing the transportation service between the above-named Washington counties and the above-named States. Our participation in this service is, and has been, authorized by the certificate issued to us by the Interstate Commerce Commission in its Docket MC-7325 and Subs 3, 5, 6, 8 and 9 thereof.

The major theme of the verified statement of the Department of Defense is that it suffers because of failure of existing carriers to effect delivery on time. In other words, it claims unsatisfactory transit times. It recites no specific instance of a failure "to arrive at destination in time for the scheduled transshipment."

The facts are to the contrary. We checked our records for the past 12 months and were unable to find a single instance where we failed to make delivery on time at Bangor, Washington (or any other point which we are authorized to serve) on the subject traffic. To the contrary, we find that very frequently the equipment arrives at Bangor but cannot be unloaded because the vessel on which the shipment is to be loaded is still at sea. This is exemplified by "Appendix A" hereto attached and by this reference made a part hereof. This is a true copy of a record regularly kept by us on a daily basis. It covers all loads handled by our company and reflects the time the equipment was available for unloading at Bangor and the day on which it was actually loaded to the vessel.

It covers 26 shipments for the four-day period shown. It reflects the following periods of detention (when the equipment was available for unloading but not unloaded by the Government).

Number of Days	Detention Time
1	2
4	2
5	2
6	1
7	3
8	4
9	6
10	2
11	1
14	3

This adds up to 206 lost days on 26 loads or almost an average of 8 days per load. Although the carriers' equipment was out of service, the Government (the Department of Defense) paid nothing for the lost time.

.....

FORREST ARNOLD

STATE OF WASHINGTON }
COUNTY OF KING } ss.

I, Forrest Arnold, being first duly sworn, depose and say:

I have read the foregoing statement, know the contents thereof, and that the same are true as stated.

.....
FORREST ARNOLD

Subscribed and sworn to before me this 9th day of December, 1968.

.....
Notary Public for Washington
My Commission expires:

APPENDIX A

☐ BLACK BALL FREIGHT SERVICE ☐ BLACK BALL TRANSPORT, Inc.

HIGHWAY MANIFEST CARGO MANIFEST Date Unloaded Roger D. Fisher

	SHIPMENT	ORIGIN		DESTINATION SERVICE DATE	TIME	DATE	TIME
1	2778 Rio 2436	Crane		ATTN INSTALLATION 11/1	1530	11/9	0500
2	2979 CFW29 1886	Fallbrook		11/2	0730	11/16	0500
3	2980 Pit 50-1219	Cornhusker		11/2	0730	11/11	0910
4	2981 MB 70-170	Polaroon		11/2	1230	11/7	1400
5	2982 CFW29 1876	Fall Leaves		11/2	1230	11/16	1330
6	2983 CFW29 1649	"		11/2	1330	11/16	0915
7	2984 MB 70-307	Polaroon		11/3	1700	11/13	1200
8	2985 Pit 50-1275	Cornhusker		11/2	1625	11/10	2300
9	2986 TP 20-816	St Juliens Creek Va		11/2	1730	11/9	1100
10	2987 Pit 50-1104	Cornhusker		11/2	pm	11/11	1015
11	2988 Rio 3223	Crane		11/2	2145	11/12	1440
12	2989 Pit 50-1220	Cornhusker		11/2	2200	11/10	2315
13	2990 TP 20-30912	St Juliens Creek		11/2	2215	11/9	1630
14	2991 MB 2647	Polaroon		11/2	2300	11/7	2330
15	2992 Rio 3269	Crane		11/3	0400	11/12	1000
16	2993 Rio 3725	"		11/3	0400	11/12	1040
17	2994 Rio 3388	St Juliens Creek		11/3	0830	11/9	1300
18	2995 Rio 3341	Crane		11/3	1130	11/12	1445
19	2996 Rio 3465	"		11/3	1330	11/12	1220
20	2997 CFW 969-78	Mrs Alston		11/3	1530	11/14	1500
21	2998 Pit 50-1435	Cornhusker		11/3	1530	11/10	2120
22	2999 Imp 2939	Polaroon		11/3	1730	11/7	2330
23	3000 Imp 4645	"		11/3	1730	11/7	2330
24	3001 Imp 2755	"		11/3	2000	11/4	2300
25	3002 Rio 3032	St Juliens Creek		11/4	0230	11/12	1100
26	3003 Rio 3120	"		11/4	0230	11/14	1030
	TOTAL						

FORM 10 BBF

APPENDIX A

BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET No. MC-129908 TA

AMERICAN FARM LINES

Reply Statement and Motion to Strike by Protestants Consolidated Copperstate Lines, Valley Motor Lines, Inc. and Western Gillette, Inc.

Comes now CONSOLIDATED COPPERSTATE LINES, VALLEY MOTOR LINES, INC., and WESTERN GILLETTE, INC. (hereinafter sometimes referred to as "Copperstate", "Valley" and "Western" and collectively as "protestants"), and respectfully file the within Reply Statement and Motion to Strike the Statement of Vincent F. Caputo of the Department of Defense.

PRELIMINARY STATEMENT

The within Reply Statement and Motion to Strike is filed without prejudice to the Motions now pending before this Commission in the within proceeding to strike applicant's Petition to Reopen and the Reply to Petitions for Reconsideration filed by the Department of Defense as well as the Motion to Vacate and Set Aside the Order of Division 1, dated November 5, 1968 Reopening the Proceeding. These motions filed by the within protestants, along with similar motions filed by other protestants, remain pending. The basis for the motions and grounds thereof is specifically set forth in the pleadings and as such no worthwhile purpose would be served by repeating all of this information herein.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-129908 TA

AMERICAN FARM LINES

Verified Statement of
F. S. KOHLES
CONSOLIDATED COPPERSTATE LINES

AND

VALLEY MOTOR LINES, INC.

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

F. S. Kohles, being first duly sworn, deposes and says:

My name is F. S. Kohles. My business address is 1220 West Washington Boulevard, Montebello, California, 90640. I am General Traffic Manager and am authorized to testify in this proceeding. I have been so employed since 1956. I am familiar with the operating authority and actual operations of Consolidated Copperstate Lines and Valley Motor Lines, Inc.

Consolidated Copperstate Lines is a common carrier of general commodities operating under certificates of public convenience and necessity issued in Docket No. MC-22167, and Valley Motor Lines, Inc. under Docket No. MC-936. Consolidated Copperstate Lines holds authority between Southern California and Texas with a pending application to purchase additional operating authority into Louisiana. Consolidated Copperstate Lines also provides service in the State of Arizona, New Mexico and Utah. Valley Motor Lines, Inc. serves points between Southern California and north to Seattle, Washington. Valley Motor Lines, Inc. is a wholly owned subsidiary of Consolidated Copperstate Lines and unified operations are conducted the equivalent of a single line service. Consolidated Copperstate

Lines and Valley Motor Lines, Inc. will be hereinafter referred to as Valley-Copperstate. The available service was set forth in the letters of protest and will not be repeated.

Valley-Copperstate transports traffic on government bills of lading, including the Department of Defense. This traffic constitutes a significant portion of our overall tonnage and revenue and is considered valuable traffic. Such traffic is handled throughout the system within the scope of the certificates and in addition handles traffic on a joint line basis either as origin carriers, destination or bridge carriers. By and large rates and routes are now in effect between all points where we can participate in the traffic. However, additional rates and routes would be established on request therefor, to the extent not already covered. In providing such service delays are encountered from time to time due to congestion of equipment at some destinations.

I have read the Statement of Mr. Caputo and find that the same is so vague that specific response is difficult. However, Valley-Copperstate serves many of the points of origin and destination referred to in the Statement. Among other points Consolidated Copperstate Lines serves is between Yuma, Arizona and Amarillo, Texas. In addition Valley-Copperstate serves the following points of origin or destination referred to on pages 4 and 5: Amarillo, Dallas, Ft. Worth, Texas; Port Chicago, Seal Beach, Fairfield, Merced, Vallejo, Sacramento, City of Industry, Oakland, Concord, Chico, Lathrop, Susanville, Richmond, El Segundo, San Bernardino, La Mirada, San Jose, Santa Clara, Vernon, El Monte, Burbank, Long Beach, National City, Marysville, Lyoth, Stockton, California; Bellemont, Yuma, Litchfield Park, Flagstaff, Phoenix, Tucson, Glendale, Arizona; Salt Lake City, Utah; and Tacoma, Washington.

Valley-Copperstate stands ready, willing and able to continue to provide service for the Department of Defense,

among other governmental agencies, and requests that the application be denied.

F. S. KOHLES
F. S. Kohles
General Traffic Manager
CONSOLIDATED COPPERSTATE LINES
and VALLEY MOTOR LINES, INC.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

F. S. Kohles, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true as stated.

F. S. KOHLES
F. S. Kohles

Subscribed and sworn to before me this 11th day of December, 1968.

JOSEPH D. EBERSOLE
Joseph D. Ebersole

(SEAL)

Notary Public in and for the County of Los Angeles, State of California.

(My Commission expires: September 15, 1969.)

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-129908 TA

AMERICAN FARM LINES

Verified Statement of
CHARLES CARBONARO
Western Gillette, Inc.

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

Charles Carbonaro, being first duly sworn, deposes and says:

My name is Charles Carbonaro. My business address is 2550 East 28th Street, Los Angeles, California, 90058. I have been employed by Western Gillette, Inc. since November, 1946, and have been Traffic Manager for the last five years. In the course of my duties with Western Gillette, Inc. I have become familiar with the operating authority, equipment, facilities and actual operations of Western Gillette, Inc. (hereinafter sometimes referred to as Western).

Western conducts operations as a common carrier of general commodities with certain exceptions pursuant to authority granted to it in Docket No. MC-8948 and related subs. Generally speaking this authority extends from California on the west, extending the length of the State between San Francisco and the border of the Republic of Mexico, and east to Chicago, Illinois, including service in the States of California, Arizona, Nevada, Texas, New Mexico, Oklahoma, Kansas, Missouri, Illinois, Arkansas and Tennessee. The services of Western, along with a copy of its certificates, were set forth in the letters of protest filed on its behalf in this proceeding.

I have read the statement of Mr. Caputo and find no specific references to Western. Western holds authority

to serve a number of the specific points referred to in this statement including the following points of origin or destination, Seal Beach, Fairfield, Merced, China Lake, Vallejo, Sacramento, City of Industry. Oakland, Lathrop, Fallbrook, Camp Pendleton, San Diego, Los Angeles, Oakland, Richmond, El Segundo, San Bernardino, La Mirada, San Jose, Santa Clara, Vernon, El Monte, Culver City, Burbank, Long Beach, National City, Oceanside and Stockton, California; Litchfield Park, Yuma, Flagstaff, Phoenix, Goodyear, Tucson and Glendale, Arizona; McAlester, Oklahoma City, and Tulsa, Oklahoma; St. Louis, Missouri and Fort Worth, Dallas, Carrollton and Garland, Texas.

Western has heretofore transported a large volume of traffic for the Department of Defense. This traffic is considered to be desirable traffic. As an indication of the volume of traffic transported by Western for the United States, a recap of the tonnage and revenues derived therefrom is set forth below for the period October 1967 through 1968. These figures were taken from the books and records of Western.

1967	Revenue	1967	Weight (lbs.)
October	$ 337,929.95	October	9,281,968
November	299,905.91	November	10,192,747
December	336,477.18	December	9,157,020
1968	**Revenue**	**1968**	**Weight (lbs.)**
January	$ 281,304.00	January	8,154,724
February	241,309.33	February	7,331,376
March	373,206.74	March	10,014,527
April	333,395.60	April	8,842,047
May	434,488.89	May	11,859,335
June	96,464.51	June	10,183,203
July	267,105.84	July	7,755,647
August	310,644.14	August	8,164,860
September	303,401.73	September	8,680,745
October	350,181.94	October	10,385,031
TOTAL	$3,965,815.76		120,003,230

As an indication of the volume of traffic having origin or destination within the scope of this application the books and records of Western Gillette, Inc. show the following volume of traffic transported during the month of October 1968, having origin or destination in the States of Arizona and California.

	Arizona	California
Weight	1,135,403 (lbs.)	7,262,186 (lbs.)
Revenue	$43,796.82	$285,651.15

In order to provide service for the Department of Defense, Western publishes routes and rates between points served direct and in addition participates in joint routings with numerous other carriers to the full extent of its authority. From time to time it is the experience of Western that delays are encountered at destinations due to congestion of traffic tying up men and equipment for various periods of time. Western stands ready, willing and able to continue to provide service to the Department of Defense and Western is desirous of continued participation in this valuable traffic. Such traffic is valuable to Western in the conduct of its overall operations. Any diversion of this traffic would be of serious concern to Western as the operating ratio for the year 1967 was 100.7. The ratio for the first quarter of 1968 was 102.7 and 98.9 for the second quarter, 1968.

Western respectfully requests that the application of American Farm Lines be denied.

CHARLES CARBONARO
Charles Carbonaro
Traffic Manager
WESTERN GILLETTE, INC.

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

Charles Carbonaro, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true as stated.

CHARLES CARBONARO
Charles Carbonaro

Subscribed and sworn to before me this 11th day of December, 1968.

JOSEPH D. EBERSOLE
Joseph D. Ebersole

(SEAL)

Notary Public in and for the County of Los Angeles, State of California.

(My Commission expires: September 15, 1969.)

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-129908 TA

AMERICAN FARM LINES

Motion To Strike

Part II

Motion To Strike

The within protestants move to strike the entire Verified Statement filed by Mr. Vincent F. Caputo, Director of Transportation and Warehousing, Department of Defense, service date November 20, 1968, and filed in the within proceeding. The copy of the statement served on the parties has not been conformed to show the actual date of verification.

The basis for this Motion to Strike is that the Statement does not conform to the Commission's Rules with respect to supporting statements to be submitted with temporary authority applications as set forth in the Commission's "Special Procedures for Motor Temporary Authority". Among other things these rules provide as follows with respect to the content of statements filed in support of applications.

"(c) *Supporting statements.* Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested).

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address and motor carrier docket number, if known, and state whether such application was granted or denied and the date."

The statement which is the subject matter of this motion does not conform to the context or spirit of the above requirements of this Commission and the same should be stricken. The statement at best is deceptive in that only total tonnage figures are given without attempt to differentiate between rail and truck shipments.

The statement does not attempt to list the specific categories of commodities to be transported, and the tonnage related thereto, even by such broad classifications as household goods, explosives, commodities, in bulk, in tank trucks, or other types of freight. No breakdown is set forth between less than truckload and truckload shipments. While the statement is replete with references to numerous points and places there is no information as to the actual volume of traffic to be transported by motor vehicle to and from the points as pertinent to this application. In fact the statement does not even provide information as to the total amount of freight to be moved by motor vehicle in the area of the application.

As noted above the tonnage compilations set forth in the statement are total figures without differentiation as to quantities moving by rail and motor vehicle. No indication is given as to the frequency of movement between the various points referred to or how the traffic was transported in the past or is being transported at the present time.

Other basic requirements have also not been complied with. For example, there is no statement as to efforts made to secure service from presently authorized motor carriers or service complaints with respect to existing carriers. The testimony is lacking in a definite statement as to the consequences of a denial of the application. The entire verified statement makes no reference as to the total amount of traffic transported by American Farm Lines in the past, or that could be transported under the exemption provided for cooperative associations in the Interstate Commerce Act, as amended. Without very detailed explanations of the services that applicant could render pursuant to the existing exemption there can be no finding of a need for additional service. References have also been made to the past services provided by American Farm Lines. Of course such references cannot be used

in support of the application unless facts are first set forth that all the transportation services were lawful in all respects, *Lynden Transfer* v. *U. S.*, 263 F. Supp. 336, Aff. 19 L. Ed. 2d, 655. It will be noted that the tonnage figures set forth in the statement date back to 1966, page 19. It will also be noted that the statement to which this motion is directed is inconsistent with the Reply to Petitions for Reconsideration, submitted on behalf of Department of Defense by the Department of the Army. The substance of that statement was alleged savings in freight charges.

Specific portions of the verified statement to which this motion is directed will be discussed below.

1. The statements with respect to the volume of traffic, origins and destinations appearing on pages 2 through 6.

These statements are irrelevant and immaterial to the issues as well as not being in compliance with the Commission's Special Rules with respect to supporting statements for temporary authority. Information is not set forth as to the volume of traffic as may move by rail or truck. No information is given with respect to the volume of traffic that might move by truck to and from the specific locations named as pertinent to this proceeding.

2. The statements with respect to the services of existing carriers appearing on pages 6 through 15.

No foundation is set forth that the general testimony with respect to existing services is within the personal knowledge of the witness and as such the same should be stricken as hearsay evidence. There is also no underlying foundation evidence that timed delivery is required for delivery of all shipments or testimony as to attempts to route such shipments via available single line services. The testimony should be stricken for the reason the same is immaterial and not in conformity

with the Commission's Special Rules as set forth hereinabove, and in particular paragraphs 7 and 8 above. The testimony is also inconsistent with the testimony appearing in paragraphs 1, 2 and 3, pages 9 and 10, wherein it is admitted that single line service is in fact available for each of the movements cited.

The testimony on pages 11 through 15 is wholly irrelevant to the issues presented under Section 210(a) of the Act. There is no evidence of actual movements between the specific points listed, frequency of such movements as may have been made in the past or planned for the future.

At page 11 the testimony simply states that there is no carrier authorized to provide service on all possible commodities over the entire scope of the application. Such testimony is totally irrelevant, and immaterial. The only relevant testimony would be specific testimony with respect to specific points supporting by all pertinent supporting statements. The only possible relevancy of the territory wide authority would be for shipments requiring split pickups or deliveries and there is no allegation that the same is here involved.

It is also stated that the use of currently authorized carriers results in higher costs to the taxpayers. This statement must be stricken for the reason there is no underlying evidence in support of this contention. The statements appearing on page 15, second paragraph, are mere conclusions and must be stricken as such.

3. The testimony appearing on pages 16-19 with respect to the services of existing carriers and needs for timed deliveries.

These statements must be stricken for the reason the same are not in conformity with the Special Rules of this Commission. The statements are mere conclusions without underlying specific evidence.

WHEREFORE, the within protestants request that the Commission issue its order striking the verified statement filed in the within proceeding.

Respectfully submitted,

By CARL H. FRITZE
Carl H. Fritze

Of Counsel:

RUSSELL & SCHUREMAN
1545 Wilshire Boulevard
Los Angeles, California 90017

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-129908 TA

AMERICAN FARM LINES

TEMPORARY AUTHORITY APPLICATION

Verified Statement of
Consolidated Freightways Corporation of Delaware

WILLIAM B. ADAMS
624 Pacific Building
Portland, Oregon 97204
Attorney for Protestant
Consolidated Freightways
Corporation of Delaware.

Dated: December 11, 1968

Due: December 13, 1968

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-129908 TA

AMERICAN FARM LINES

TEMPORARY AUTHORITY

STATE OF OREGON
COUNTY OF MULTNOMAH } ss.

Verified Statement of Edward V. Taylor

I, Edward V. Taylor, being first duly sworn, depose on my oath and say:

I am Director, Western Traffic Service, of Consolidated Freightways Corporation of Delaware, P. O. Box 3062, Portland, Oregon 97208. I have personal knowledge of the following matters and things relating to the application.

The primary representation of the Department of Defense is that transit times are not met by the existing carriers so that proper trans-shipment can be made. We have searched our records since January 1, 1968 and cannot find any instance on which we have failed to achieve the required time to meet the trans-shipment vessel.

On the contrary, our equipment is, as a general practice, detained at the trans-shipment point to await the arrival of the trans-shipment carrier. For example, Black Ball Freight Service conducted a study of trailers available for unloading during the first four days of November, 1968. During that period our company interlined with Black Ball Freight Service near Tacoma, Washington six shipments destined for Bangor, Washington. All of these shipments arrived in Bangor, Washington for trans-shipment to vessels prior to the date the vessel was available for loading. These six shipments were detained, awaiting unloading, a total of 59 days, or an average of almost 10 days per shipment. This is typical of the delays our equipment experiences at Bangor. We also experience similar delays at Concord, California. As a further ex-

ample, on December 11, 1968, we had 28 trailers available for unloading at Bangor. Of these, 13 had been available for unloading at Bangor for an average of more than 7 days. These trailers were not interlined with Black Ball Freight Service, but were moved under our own authority to Bangor, operated by teams in sleeper cabs.

We transport millions of pounds of traffic for the Department of Defense to these ports. We have done this for many years. During the past there have been a few (and a very few) occasions where because of breakdowns of equipment, or other factors beyond our control, when we have been a few hours late.

On the other hand, when our equipment is utilized for storage awaiting trans-shipment to vessels, we do not receive compensation for the detention, but also are prevented from making our equipment available for any additional service. It is a substantial economic waste. This is not offered as a criticism of the Department of Defense as we know it has problems, but merely to point out that in the vast majority of instances the required delivery times are met.

.....
Edward V. Taylor

STATE OF OREGON
COUNTY OF MULTNOMAH } ss.

I, Edward V. Taylor, being first duly sworn, depose on my oath and say: I have read the foregoing statement, know the contents thereof, and that the same are true as stated.

.....
Edward V. Taylor

Subscribed and sworn to before me this 11th day of December, 1968.

.....
Notary Public for Oregon

My Commission Expires:
.....

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-129908 TA

AMERICAN FARM LINES
TEMPORARY AUTHORITY APPLICATION

Verified Statement of Robert O. Homberger

I am Robert O. Homberger, Vice President—Traffic for Dealers Transit, Inc., located at 7701 South Lawndale Avenue, Chicago, Illinois 60652.

Dealers Transit, Inc., hereinafter referred to as "Dealers", originally filed a protest in this matter dated June 6, 1968, which clearly stated Dealers' position, which position has not changed since that time. A copy of that original protest is attached hereto as Appendix "A". The instant verified statement is made by myself in reply to the statement filed by American Farm Lines, applicant, of Vincent F. Caputo, Director for Transportation and Warehousing Policy of the Department of Defense. That statement was filed by applicant pursuant to the order of the Commission served November 5, 1968, which reopened this matter for the receipt of further evidence.

Dealers is a motor vehicle transporter (including trailers) and a heavy hauler operating under Certificates No. MC-4405 and subs thereunder. Dealers originally protested this application because of the wide territorial scope involved and the completely unrestricted nature of the commodity descriptions which were requested. As this case has developed and particularly after the receipt of the statement of Vincent F. Caputo, it seems to become clear that the Department of Defense is here interested in the transportation of explosives and general commodities as the term is normally used, and not in the transportation of automobiles, trucks, trailers, or items which because of their size or weight require special handling.

On the other hand, while it does not appear that the latest statement of the Department of Defense cites any need for additional service in connection with those latter named commodities, the applicant has not offered to restrict against the transportation of those commodities. I can only assume, however, that Mr. Caputo is not speaking, in his statement, of automobiles, trucks, trailers, or items which because of their size or weight require special handling, because nothing in his statement relates to such items. All of the statements which he makes relate either to Class A and B explosives or to general commodities as that term is generally used. I have been over the statement of Mr. Caputo completely, and find that he speaks of Class A and B explosives, general commodities, or freight all kinds, in all instances except where specific commodities are enumerated on pages 5, 6, 9 and 20 of his statement. In none of these listings does he make any mention of automobiles, trucks, trailers, or items which because of size or weight require special handling.

Mr. Caputo's chief complaint seems to be with relation to interline service. He alleges that he is unable to get single line service between the states which are involved in this application. This is another reason why I believe that the commodities in which Dealers has an interest are not involved. If they were, Mr. Caputo, with the vast resources at his command, would surely know that Dealers possesses single line authority for a substantial part of the movements that he describes insofar as those commodities are concerned. For one thing, Dealers has authority to move trailers in secondary movements between all points and places in the 48 states. If the Defense Department had any trailers to move, there could certainly be no question as to Dealers' ability to do so in single line service. Dealers also has initial authority for trailers throughout much of the area here involved.

Insofar as commodities which because of size or weight require special handling, Dealers can also provide much

of the direct line service that would be involved, assuming that the Department of Defense was looking for available transportation on such items. Under its Subs 391, 353 and 400, Dealers can render single line service between Kentucky, Indiana, Arkansas, on the one hand, and California, Arizona and Nevada, on the other. Under its Subs 384, 353 and 400, Dealers can render single line service between Oklahoma, Missouri, and Kansas, on the one hand, and, California, Arizona, and Nevada, on the other. Under its Subs 353 and 400, Dealers can render single line service between Texas and Louisiana, on the one hand, and, California, Arizona and Nevada, on the other.

The only two destination states which Dealers presently cannot service in single line service and which are involved in this application are the states of Washington and Utah. Dealers presently has in process before the Commission an application to serve both of those states in its Sub No. 450. It is interesting to note that the Department of Defense did not seek to become involved in that hearing on behalf of Dealers, which it would seem it would most certainly have done if it had been in any dire straits with respect to the transportation of size and weight articles.

In addition, our Sub No. 389 provides authority for the movement of cargo containers from Fort Wayne, Indiana, Fresno, Vina Vista and Fremont, California, Gregg County, Texas and Springfield, Missouri. Our Sub No. 336 provides authority on road construction machinery from Evansville, Indiana, and our Sub No. 419 provides authority on the movement of bodies, refuse containers, hydraulic hoists, lift gates, from Bryan County, Oklahoma.

None of the commodities which I have discussed above have been mentioned in the supporting statement of the Department of Defense. There is no question, however, that such commodities are moving via Dealers. I estimate that within the scope of the instant application, Dealers

is moving $2,500,000 worth of such traffic annually, and that over 50% of it is moving on government bills of lading.

A number of things appear to be obvious. First of all, the Defense Department is moving a substantial amount of traffic by Dealers Transit, Inc. within the involved territory. Since none of these commodities have been specifically named in the statement of Mr. Caputo, it would follow that he has no complaint with the manner in which these commodities have been moved. Secondly, since the chief complaint of Mr. Caputo revolves about the alleged lack of single line service, and the resultant use of interline service, it would further appear that he is not talking about the type items which are embraced in Dealers' certificates because, as I have shown, Dealers has authority to provide single line service in all 48 states as to certain commodities, and can provide single line service in the bulk of the territory involved in this application on size and weight commodities. As a consequence, it would follow that Mr. Caputo is not speaking of these kinds of items in his statement, but is speaking rather of Class A and explosives and of general commodities as that term is ordinarily used.

If the certificate which is ultimately issued to American Farm Lines by virtue of this application, if any, is restricted against the transportation of automobiles, trucks, trailers, and items which because of size or weight require special handling, the interests of Dealers in this application would be removed. The insertion of such a restriction in any certificate which may be issued is completely warranted for the reasons herein stated, and it is my request that the Commission so restrict any certificate which it may see fit to grant to the applicant pursuant to the reopened hearing in this matter.

ROBERT O. HOMBERGER
Robert O. Homberger

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

Personally appeared before me, a Notary Public in and for the State and County aforesaid, on this —— day of December, 1968, ROBERT O. HOMBERGER, known to me to be the Vice President—Traffic of Dealers Transit, Inc., who, after being duly sworn by me, did state that the foregoing is his statement and that the facts contained therein are true and correct to the best of his knowledge, information and belief.

LUCILLE M. MCCUE
Notary Public in and for the
State of Illinois, County of Cook

(SEAL)

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-129908 TA

IN THE MATTER OF THE APPLICATION OF
AMERICAN FARM LINES

Response of East Texas Motor Freight Lines, Inc., to Verified Statement of Vincent F. Caputo

EAST TEXAS MOTOR FREIGHT LINES, INC., hereinafter referred to as East Texas, a protestant in the above proceeding, files this response to the Verified Statement of Vincent F. Caputo dated November 20, 1968.

I.

By application filed May 17, 1968 and published in the Federal Register of June 8, 1968, page 8523, American Farm Lines seeks authority to operate as a common carrier by

motor vehicle over irregular routes transporting the following:

> General commodities, including Classes A and B explosives, restricted to traffic moving on Government Bills of Lading
>
> > Between points in Arkansas, Illinois, Indiana, Kansas, Kentucky, Louisiana, Missouri, Oklahoma and Texas, on the one hand, and on the other, points in Arizona, California, Nevada, Utah and Washington.

East Texas filed a timely protest on July 12, 1968. The Temporary Authorities Board denied the application. After the filing of applicant's Petition for Reconsideration and a timely reply thereto by East Texas, Division 1, acting as an Appellate Division, on September 3, 1968, vacated and set aside the Temporary Authorities Board's July 12, 1968 order and granted temporary authority for a ninety-day period. By order dated November 5, 1968, the Commission, Division 1, acting as an Appellate Division, reopened the proceeding on its own motion, for the submission of a verified statement by applicant and any response which might be filed by protestants. This statement is submitted as a response as provided in that order.

II.

Reaffirmation of the Position of Protestant East Texas Motor Freight Lines, Inc.

East Texas reaffirms its interest in the application and its position stated in previously filed pleadings herein, including the facts and circumstances set out in its original protest dated June 19, 1968, which is already a part of the record. The operating authority issued to East Texas by the Commission is set out in National Motor Freight Traffic Association Tariff S-1, MF-I.C.C. No. S-1, National

Directory of Operating Rights, Sec. 041432 original pages 1 through 6 and third revised pages 7 and 8.

III.

Verified Statement of Vincent F. Caputo Is Not in Compliance With the Commission Rules Pertaining to Temporary Authority

The I.C.C. Rules and Regulations, 49 CFR Sec. 1131.2 (Filing of Applications for Temporary Authority) concerning supporting statements enumerate eleven specific items which must be contained in *any* supporting statement. The supporting statement to which this reply is directed fails to comply with these mandatory requirements. No attempt whatever is made to answer 49 CFR Sec. 1131.2(c)(3) and (8) which require information concerning the past transportation of the traffic involved and the efforts which have been made to obtain service from existing motor, rail or water carriers, and the dates and results of such efforts.

IV.

The Verified Statement of Vincent F. Caputo Will Not Support the Findings Required for a Grant of Temporary Authority.

The above mentioned statement is so vague and in such general terms that it cannot support a finding "that there is an immediate and urgent need for the motor carrier service here involved, and that there is no motor carrier service capable of meeting such need." However, throughout the entire statement the presence of existing service is clearly shown. At page 9 the witness makes this statement: ". . . the one carrier now holding a certificate authorizing it to provide a single-line service for movement of such shipments on an irregular route basis consistently effects 'third morning' delivery at Bangor, Washington." Also at page 9: ". . . delivery is made within 72 hours

after dispatch of the shipment from San Jose, Calif. when service is provided on a single-line basis by carriers using 2-man driving teams." At page 10: "In some instances service is available from (regular route carriers) on a single-line basis, while in other instances the only service available is that on a 'joint-line' basis."

Further, the volume figures given at pages 5 and 9 of the statement show extensive service presently available. When converted to a similar basis at 1½ years coverage, simple computation shows that of a total of some 3,109,090,908 (172,727,272 pounds per month) transported during the period 12/31/66 to 6/30/68, American Farm Lines transported 74,155,685 pounds or approximately only 2.4% of the traffic involved. While on the other hand existing common carrier service transported approximately 97.6% of the traffic involved, or some 3,034,935,223 pounds in the same period. Nothing can more emphatically illustrate the existence of a vast amount of common carrier service presently available to the supporting shipper than applicant's own statement showing transportation by existing carriers of in excess of *3 billion* pounds of freight. Certainly the finding that there is no motor carrier service available capable of meeting the needs of the supporting shipper herein cannot be found in the face of these figures and without such a finding there is no basis for Section 210a(a) temporary authority.

V.

Desire for Single Line Service Will Not Justify the Issuance of Temporary Authority.

The Commission's Rules at 49 CFR Sec. 1131.4(4) provide that desire for single line service will not justify the issuance of temporary authority unless it is clearly established that existing carriers are unable to provide service which meets the reasonable immediate and urgent need of the supporting shipper. It is apparent from the state-

ment of Mr. Caputo that this temporary authority application is one seeking to inject one more common carrier into an area where a plethora of common carrier service, both direct and interline, is presently available to the Department of Defense. This is no basis for a grant of temporary authority.

Applicant herein has not established the legal prerequisites for temporary authority under Section 210a(a), namely, (1) that there exists an immediate and urgent need for any of the proposed service and (2) that there is no carrier service capable of meeting such a need.

Therefore, protestant urges that upon reconsideration this application should be denied.

Respectfully submitted,

EAST TEXAS MOTOR FREIGHT LINES, INC.
A. DOYLE CLOUD, JR.
2355 Stemmons Freeway
P. O. Box 10125
Dallas, Texas 75207
Its Attorney

December 10, 1968.

BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET MC-129908, TA

AMERICAN FARM LINES TEMPORARY AUTHORITY APPLICATION

STATE OF WASHINGTON }
COUNTY OF KING } ss.

Verified Statement of Wayne S. Green

I, WAYNE S. GREEN, being first duly sworn, depose on my oath and say:

I am Director of Commerce of Garrett Freightlines, Inc., a protestant herein. I have personal knowledge of the following matters and things relating to the application.

That the facts hereinafter set forth are in addition to that contained in my company's protest to the application.

That for more than the past twenty-five years Garrett has participated in the transportation of general commodities, including Classes A and B explosives moving on Government bill of lading between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and on the other, points in western states which it is authorized to serve. That in the year 1967, my company derived, in excess, 13 percent of its total revenue from the transportation of traffic moving on Government Bills of Lading. The revenue derived from that traffic in 1967 was $6,140,111.86. That such traffic is necessary for the maintenance of my company's operations in that during 1967 our operating ratio (percentage of total expenses to total revenue) was 94.1. That the exclusion of 13 percent of our total revenue would put our company in a loss position. That our participation in the subject traffic consists of being the delivering, originating, or bridge carrier on traffic moving between points in eleven western states, and states enumerated

above, with interline with other carriers at Denver, Colorado; St. Paul, Minnesota; or Albuquerque, New Mexico. The equipment of the connecting carrier moves through with our company performing the transportation service between the above named western states and the above-named eastern states. Our participation in this service is, and has been, authorized by the certificate issued to us by the Interstate Commerce Commission in its Docket MC-263 and outstanding subs.

The major theme of the verified statement of the Department of Defense is that it suffers because of failure of existing carriers to effect delivery on time. In other words, it claims unsatisfactory transit times. It recites no specific instance of a failure "to arrive at destination in time for the scheduled trans-shipment."

The facts are to the contrary. We checked our records for the past 12 months and were unable to find a single instance where we failed to make delivery on time at either Port Chicago, California or to our connecting carrier, Black Ball Freight Service at Seattle or Tacoma, Washington or traffic destined to Bangor, Washington. To the contrary, we find that very frequently the equipment arrives at Bangor but cannot be unloaded because the vessel on which the shipment is to be loaded is still at sea. We adopt the statement of Black Ball Freight Service and the information contained in Appendix "A" attached thereto so far as Garrett trailers are concerned. We also attach a copy of the Black Ball Appendix "A" hereto. The Garrett trailers are listed on line numbers 1, 11, 15, 16, 18 and 19 of Appendix "A".

We also checked our records of detention time on truckloads of ammunition delivered by Garrett for unloading at Port Chicago, California during the month of November, 1968.

The results of this investigation are contained in Appendix "B" attached hereto. These are by no means all

of the loads for the month of November but are the loads which we were able to get accurate information regarding unloading. The average detention time is much greater than that shown in Appendix "B". For example, we have some 30 trailers on hand for unloading at Port Chicago today. This adds up to 51 lost days on ten (10) loads or an average of five (5) days per load although the carrier's equipment was out of service, the Government (the Department of Defense) paid nothing for the lost time.

WAYNE S. GREEN
Wayne S. Green

Subscribed and sworn to before me, a Notary Public for the State of Idaho, this 11th day of December, 1968.

LOUISE E. COOPER
Louise E. Cooper
Notary Public for Idaho
Residence: Pocatello, Idaho

(Seal)

My Commission Expires: 7-15-69

APPENDIX A

☐ BLACK BALL FREIGHT SERVICE ☐ BLACK BALL TRANSPORT, Inc.

HIGHWAY MANIFEST

CARGO MANIFEST Date 11/4/65 Page No. 1 of 1

	SHIPMENT	CONSIGNEE	STOP OFF	SHIPPER — ORIGIN	SCHED.	DELIVERED	
1	2978 Rico 3436	Crane			1530	11/9	0600
2	2979 CFW29 1819 2253	Fallbrook		11/2	0730	11/16	0800
3	2980 Pac 50-1219	Corn Lumber		11/2	0730	11/11	0910
4	2981 HB 70-170	Folsom		11/2	1230	11/7	1400
5	2982 CFW29 1870 2021	Fall Brook		11/2	1230	11/16	1320
6	2983 CFW29 1647 2220	"		11/2	1230	11/16	0915
7	2984 HB 70-307	Folsom		11/2	1700	11/13	1200
8	2985 Pac 50-1275	Corn Lumber		11/2	1625	11/10	2330
9	2986 TP 20-816	Mt Julian Creek Via		11/2	1730	11/9	1100
10	2987 Pac 50-1104	Corn Lumber		11/2	Pm	11/11	1015
11	2988 Rico 3223	Crane		11/2	2145	11/12	1440
12	2989 Pac 50-1220	Corn Lumber		11/2	2200	11/10	2315
13	2990 TP 20-30112	Mt Julian Creek		11/2	2215	11/9	1630
14	2991 HMT 2647	Folsom		11/2	2300	11/7	2330
15	2992 Rico 3269	Crane		11/3	0400	11/12	1000
16	2993 Rico 3725	"		11/3	0400	11/12	1040
17	2994 Rico 3288	Mt Julian Creek		11/3	0830	11/9	1300
18	2995 Rico 3341	Crane		11/3	1230	11/12	1445
19	2996 Rico 2465	"		11/3	1230	11/12	1220
20	2997 CFW 969-28	Mc Abee		11/3	1530	11/4	1540
21	2998 Pac 50-1135	Corn Lumber		11/3	1530	11/10	2120
22	2999 Inv # 2739	Folsom		11/3	1730	11/7	2330
23	3000 Rico CMD 4645	"		11/3	1730	11/7	2330
24	3001 HMT 2753	"		11/3	2000	11/4	2300
25	3002 Rico 3032	Mt Julian Creek		11/4	0230	11/12	1100
26	3003 Rico 3120	"		11/4	0330	11/14	1030
	TOTALS						

APPENDIX A

APPENDIX "B"

Delivery and Unloading Record of Explosives Loads Delivered by Garrett Freightlines, Inc. To Port Chicago, California for Export Via Water

Trailer No.	Delivery Date	Unloading Date	Detention Time
Riss 3720	11-26-68	11-30-68	4 days
Riss 3727	11- 7-68	11-29-68	2 days
Ryder 91-137	11-10-68	11-13-68	2 days
Rock Island 6072	11-17-68	11-22-68	5 days
Rock Island 6121	11- 3-68	12- 1-68	28 days
Baggett 1519	11-19-68	11-23-68	4 days
WNX 621	11-28-68	11-30-68	2 days
Garrett 3026	11-30-68	12- 1-68	1 day
Garrett 3440	11-28-68	11-30-68	2 days
Garrett 3472	11-30-68	12- 1-68	1 day

BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET No. MC-129908 TA

AMERICAN FARM LINES—TEMPORARY AUTHORITY APPLICATION

Verified Statement of E. E. Hamel on Behalf of Protestant, International Transport, Inc., in Reply to Verified Statement of Vincent F. Caputo

I, E. E. Hamel, am Traffic Manager of International Transport, Inc., with headquarters at Rochester, Minnesota, hereinafter for purposes of brevity referred to as International.

International has filed a protest to any grant of the application for authority between Kentucky, Indiana, Illinois, Missouri and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Utah and Arizona.

In its order of September 3, 1968, Division 1, acting as an Appellate Division, reversed a prior denial by the Temporary Authorities Board and granted applicant authority to transport general commodities, moving on government bill of lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas on the one hand, and, on the other, points in Washington, California, Nevada, Utah and Arizona. Subsequently, pursuant to petition of protestants, the United States District Court for the Western District of Washington, in *Black Ball Freight Service et al.* v. *United States,* stayed the effective date of the Division 1 order of September 3.

In its order of November 5, 1968, Division 1 reopened the instant proceeding to permit applicant to present additional evidence through its supporting shipper, the Department of Defense.

The additional evidence, set forth in a Verified Statement of Vincent F. Caputo, has been received and read by me. The statement is inaccurate and demonstrates a substantial lack of knowledge of the service provided by existing carriers and the manner in which the Department of Defense allocates its traffic to existing carriers.

For example, on page 14, Mr. Caputo states that there is no known carrier authorized to provide single line service for movement of DOD traffic from numerous points, such as Travis Air Force Base, California, to Crane, Indiana, etc. This statement is made in spite of the fact that DOD is using International for single line service daily from California. International holds authority to transport commodities which because of size or weight require the use of special equipment, from points in California, to 30 states including Indiana, Missouri, Kansas, etc. International holds similar authority to provide single line service from Indiana, Illinois, Missouri, Kansas, to Washington, Utah and California.

International competes for this traffic with numerous other carriers. Some of them are participants in joint-line service. It is International's experience that the Department of Defense divides the traffic equally among the carriers without regard to whether the traffic is transported in single line or 2, 3 or 4 carrier joint-line service. This policy is followed even though International has ample idle equipment available to handle additional traffic in *irregular route, 2 man, single line service.* The fact that certain carriers handle the traffic in joint-line service does not deter the Department of Defense in its daily tenders of traffic. Yet, the statement of Mr. Caputo would have the Commission believe that some priority is given to single line carriers. Such is certainly not the fact. International gets a proportionate share and no more.

The statement of Mr. Caputo is apparently not based upon any actual knowledge of the service provided by existing carriers. It should, therefore, be disregarded and the application should be denied.

E. E. HAMEL
E. E. Hamel

STATE OF MINNESOTA }
COUNTY OF OLMSTED } ss.

E. E. Hamel, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof; and that the same is true as stated.

E. E. HAMEL
E. E. Hamel

Subscribed and sworn to before me this 4th day of December, 1968.

EVERAD R. GJOVIE
Everad R. Gjovie
Notary Public,
Olmsted County, Minn.

My Commission Expires December 28, 1973

(Received Dec. 13, 1968)

BEFORE THE
INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C.

Docket No. MC 129908 TA

IN THE MATTER OF:

AMERICAN FARM LINES, OKLAHOMA CITY, OKLAHOMA,
APPLICATION, GENERAL COMMODITIES

Verified Statement of Carl Atherton, Assistant to Executive Vice President, Leonard Bros. Trucking Co., Inc.

My name is Carl Atherton. I am Assistant to the Executive Vice President of Leonard Bros. Trucking Co., Inc. a Protestant in these proceedings. I have been associated with the company since April 1957 and held the position of Traffic Manager from 1960 to April 1968 when I became Assistant to the Executive Vice President. My business address is 2595 N.W. 20th Street, Miami, Florida.

On June 7, 1968, Mr. J. Fred Dewhurst, Executive Vice President of Leonard Bros. Trucking Co., Inc. filed a Protest to the granting of the above application filed by American Farm Lines, Docket No. MC 129908 TA for temporary authority.

This verified statement is filed in support of this company's protest.

Leonard Bros. Trucking Co., Inc. is a specialized and heavy hauler carrier based in Miami, Florida. This company holds the following authority:

Leonard Bros. Trucking Co., Inc.
Certificate of Public Convenience and Necessity
No. MC 19227, Sub 32*

IRREGULAR ROUTES:

AIRPLANE and AIRPLANE PARTS, and AIRPLANE SUPPLIES and EQUIPMENT,

Between points and places in Florida.

Between points and places in Florida, on the one hand, and, on the other, points and places in Alabama, Georgia, Illinois, Louisiana, Mississippi, South Carolina, Tennessee, and Texas.

COMMODITIES (except boats), the transportation of which because of their size or weight require the use of special equipment.

Between points and places in Florida, on the one hand, and, on the other, points and places in Connecticut, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and the District of Columbia, traversing Arkansas and Iowa for operating convenience only.

COMMODITIES, which because of size or weight require special equipment, except airplanes and airplane parts,

Between points and places in Florida, on the one hand, and on the other, points and places in Alabama, Georgia and South Carolina.

Leonard Bros. Trucking Co., Inc.
Certificate of Public Convenience & Necessity
No. MC-19227, Sub 43

IRREGULAR ROUTES:

COMMODITIES other than oilfield equipment, which because of size or weight require specialized handling or the use of special equipment, over irregular routes,

Between points and places in Florida, on the one hand, and on the other, points and places in Texas.

Leonard Bros. Trucking Co., Inc.
Certificate of Public Convenience & Necessity
No. MC-19227, Sub 44

IRREGULAR ROUTES:

UNCRATED AIRPLANE PARTS, SUPPLIES, MACHINERY, and equipment used in the maintenance, servicing, repair and operation of airplanes, the transportation of which, because of their size or weight, require special equipment or special handling or rigging, over irregular routes,

Between points and places in Florida, on the one hand, and on the other, points and places in California.

Authority is granted to traverse Georgia, Alabama, Tennessee, Mississippi, Louisiana, Arkansas, Oklahoma, Texas, New Mexico, Arizona, and Nevada for operating convenience.

Leonard Bros. Trucking Co., Inc.
Certificate of Public Convenience & Necessity
No. MC-19227, Sub 54

IRREGULAR ROUTES:

AIRPLANE PARTS and SUPPLIES, MATERIALS, PARTS and COMPONENTS used in the construction of aircraft, and supplies, machinery and equipment, used in the maintenance, servicing, repair and operation of aircraft, except those which because of their size or weight require the use of special equipment and handling, or rigging, *and missile parts, and supplies, materials, parts and components* used in the maintenance, servicing, repair, and operations of missiles.

Between points in Florida, on the one hand, and on the other, points in California.

From Burbank and Chula Vista, Calif., to Marietta, Ga., with no transportation for compensation on return except as otherwise authorized.

Leonard Bros. Trucking Co., Inc.
Certificate of Public Convenience & Necessity
No. MC-19227, Sub 75 (In Part)

Such other COMMODITIES as required specialized handling or rigging because of size or weight.

Between points in Kansas, Missouri, Nebraska, New Mexico and Oklahoma.

Between points in Kansas, Missouri, Nebraska, New Mexico and Oklahoma, on the one hand, and, on the other, points in Texas.

Leonard Bros. Trucking Co., Inc.
Certificate of Public Convenience & Necessity
No. MC-19227, Sub 88

IRREGULAR ROUTES:

COMMODITIES, (other than MACHINERY, EQUIPMENT, MATERIALS, and SUPPLIES used in, or in connection with, the discovery, development, production, refining, manufacture, processing, storage, transmission, and distribution of natural gas and petroleum and their products and by-products, and machinery, materials, equipment and supplies used in, or in connection with, the construction, operation, repair, servicing, maintenance, and dismantling of pipelines, including the stringing and picking up thereof) the transportation of which because of size or weight require the use of special equipment and related parts when their transportation by said carrier of commodities which by reason of size or weight require special equipment.

Between points in Texas.

Between points in Texas, on the one hand, and on the other, points in Arkansas and Louisiana.

Leonard Bros. Trucking Co., Inc.
Certificate of Public Convenience & Necessity
No. MC-19227, Sub 93

IRREGULAR ROUTES:

(1) GUIDED MISSILES, (2) GUIDED MISSILE PARTS, and (3) GUIDED MISSILE SUPPLIES and EQUIPMENT used in the maintenance, servicing, repair, and operation of GUIDED MISSILES, restricted against the transportation of any of the above authorized commodities which, because of size or weight, require the use of special equipment or special handling.

Between points in Florida, on the one hand, and, on the other, points in Alabama, Georgia, Illinois, Louisiana, Mississippi, South Carolina, and Texas.

Leonard Bros. Trucking Co., Inc.
Certificate of Public Convenience & Necessity
No. MC-19227, Sub 112

IRREGULAR ROUTES:

AIRPLANES AND AIRPLANE PARTS, the transportation of which, because of size or weight, require the use of special equipment,

From Newbury Park, Chula Vista, and Riverside, California, to points in King and Snohomish Counties, Washington.

Leonard Bros. Trucking Co., Inc. is the majority Stockholder of Southwestern Transfer Company, Inc. who holds the following authority:

SOUTHWESTERN TRANSFER CO., INC.
Certificate of Public Convenience & Necessity
No. MC-31321

IRREGULAR ROUTES:

MINE MACHINERY, RANCH and FARM EQUIPMENT, and CONTRACTORS' EQUIPMENT, MACHINERY, MATERIALS and SUPPLIES,

Between El Paso, Texas and points within 50 miles thereof, on the one hand, and, on the other, points in New Mexico.

COMMODITIES, the transportation of which because of size or weight requires the use of special equipment, and RELATED MACHINERY PARTS and RELATED CONTRACTORS' MATERIALS and SUPPLIES when their transportation is incidental to the transportation of commodities which by reason of size or weight requires special equipment.

Between points and places in Arizona, and New Mexico and those in Texas west of the eastern boundary of Lipscomb, Hemphill, Wheeler, Collingsworth, Hall, Motley, Dickens, Kent, Scurry, Howard, Glascock, Reagan, Crockett and Val Verde Counties, Texas.

MC-31321 Sub 6 (In Part)

COMMODITIES requiring special handling and rigging because of size or weight, over irregular routes,

Between points and places in Texas.

Leonard Bros. Trucking Co., Inc. has purchased the following operating authority from Underhill Transfer Company and the transaction was consummated June 1, 1968.

UNDERHILL TRANSFER COMPANY
Certificate of Public Convenience & Necessity
No. MC-32525 (In Part)

IRREGULAR ROUTES:

MACHINERY

Between Yuma, Arizona and Calexico, California, serving all intermediate points and all off-route points

within 25 miles of Yuma and within 15 miles of route as specified immediately below:

From Yuma over U.S. Highway 80 El Centro, California, thence over U.S. Highway 99 to Calexico, California, and return over the same route.

Between Yuma, Arizona and Westmoreland, California, serving all intermediate points, and all off-route points within 25 miles of Yuma and within 15 miles of route as specified immediately below:

IRREGULAR ROUTES:

GENERAL COMMODITIES, except liquids in bulk and articles of unusual value.

Between points in California and Arizona within 25 miles of Yuma, Arizona, including Yuma.

My company provides an interchange service whereby the same truck and drivers handle the shipments from origin to destination with carriers holding the following authorities:

PAXTON TRUCKING COMPANY
Certificate of Public Convenience & Necessity
MC-13522 Sub 9 (In Part)

Such COMMODITIES *as require special equipment or handling by reason of their unusual size, weight or shape* and in connection therewith *parts, equipment, materials and supplies not requiring special equipment or handling* that are appurtenant to or a necessary part of the same project or transaction.

Between points on or within 50 miles airline distance laterally of the following highways:

(A) U.S. Highway 101, 101 alternate and 101 by-pass between the Mexican Border and the California-Oregon State Line.

(B) U.S. Highway 99, 99-E and 99-W between the Mexican Border and the California-Oregon State Line.

(C) U.S. Highway 395 between San Diego and the Nevada-California State Line near Topaz and between the California-Nevada Line near Peavine and the California-Oregon Line.

(D) U.S. Highway 40 and 40 alternate between San Francisco and the Nevada State Line.

(E) U.S. Highway 50 between San Francisco and the Nevada State Line.

(F) U.S. Highway 60 between Los Angeles and the California-Arizona State Line.

(G) U.S. Highway 80 between San Diego and the Arizona State Line.

(H) U.S. Highway 66 between Los Angeles and the Arizona State Line.

(I) U.S. Highway 91 between Barstow and the Nevada State Line.

(J) U.S. Highway 97 between its junction with U.S. Highway 99 and the California-Oregon State Line.

(K) U.S. Highway 95 between its junction with U.S. Highway 60 and the California-Nevada State Line.

(L) U.S. Highway 299 between its junction with U.S. Highway 101 and U.S. Highway 395.

(M) U.S. Highway 399 between Ventura and its junction with U.S. Highway 99.

(N) U.S. Highway 466 between Paso Robles and the California-Nevada State Line.

(O) California State Highway 20 between its junction with U.S. Highway 101 and U.S. Highway 395.

(P) California State Highway 36 between its junction with U.S. Highway 99 and U.S. Highway 395.

(Q) California State Highway 139 between its junction with U.S. Highway 299 and the California-Oregon State Line.

(R) California State Highway 33 between Wheeler Ridge and Tracy.

(S) California State Highway 127 and California Highway 190 between junction of California State Highway 127 and U.S. Highway 466 near Baker and junction of California State Highway 190 with U.S. Highway 395.

Carrier may conduct its operation along any street, road, highway or combination of such thoroughfares necessary or convenient to the rendering of its service, including but not limited to the highways set forth in paragraphs (A) through (S) above.

Carrier shall be subject to the following restrictions:

Except for deliveries to and from job sites such as construction projects, oil, gas, or water wells, or mines, oil fields, warehouses, or field storage yards, no freight shall be transported in excess of ten miles on either side of highway designated in paragraphs (A) through (S) above.

MITCHELL BROS. TRUCK LINES, (A CORP.)
Certificate of Public Convenience & Necessity
No. MC-32882

IRREGULAR ROUTES:

FOREST PRODUCTS and LUMBER, between points and places in Oregon, Washington, and Idaho, and that part of California within 150 miles of the Oregon-California State Line. AGRICULTURAL COMMODITIES, in truckloads, between Portland, Oregon, and Vancouver, Washington, on the one hand, and on the other, points and places in Washington and Oregon. BUILDING MATERIALS AND HEAVY MACHINERY, in truckloads, between points and places within

50 miles of Portland, Oregon, on the one hand, and on the other, points and places in Oregon and Washington, and Nezperce, Payette, Canyon and Owyhee Counties, Idaho. BUILDING MATERIALS and HEAVY MACHINERY, including heavy steel girders, steel pipe, boilers, water works, supplies and plumbing goods, cement, cast stone, wooden pipe tanks (set up or knocked down), and fabricated steel reinforcing bars, and other commodities of similar nature, between Portland, Oregon, and Vancouver, Washington, on the one hand, and on the other, points and places in Oregon, Washington and Idaho, and that part of California within 150 miles of the Oregon-California State Line. MACHINERY, CONTRACTORS' EQUIPMENT and CONSTRUCTION MATERIALS, between points and places in Washington and Oregon. Between Seattle, Washington, on the one hand, and on the other, points and places in that part of Montana bounded by a line beginning at Great Falls and extending in a northerly direction through Whitefish to the boundary of the United States and Canada, thence in a westerly direction along the boundary of the United States and Canada to junction U.S. Highway 91, thence along U.S. 91 to Great Falls, between points and places in Washington, on the one hand, and on the other, points and places in Idaho, and those in that part of Montana of the west of a line beginning at the Montana-Wyoming State Line and extending along U.S. Highway 87 to Great Falls, thence along U.S. Highway 91 to the boundary of the United States and Canada. HEAVY MACHINERY and BUILDING MATERIALS between points in Josephine, Jackson, Douglas, and Curry Counties, Oregon, on the one hand, and on the other, points in California north of a line extending east from Half Moon Bay through Redwood City and Miami to the Nevada-California State Line, including the points named.

CARGO CARRIERS, INC.
Certificate of Registration No. MC 121449 (Sub-No. 1)*

PART I

* * * transportation, as a highway common carrier, of general commodities as follows:

1. Between all points and places in the Los Angeles Territory as described in Part II set forth below.

2. Between all points and places in the San Francisco Territory as described in Part III set forth below (See Restriction).

3. Between all points and places on and within 25 miles laterally of the following routes (See Restriction).

   a. U.S. Highway 99 between San Fernando and Sacramento, inclusive.

   b. State Highway 65 between its junction with U.S. Highway 99 near Bakersfield and its junction with State Highway 63 north of Elderwood.

   c. State Highway 63 between its junction with State Highway 65 and Orosi, inclusive.

   d. Unnumbered highways known as El Monte Way, Alta Avenue, Manning Avenue and Reed Avenue between Orosi and Minkler via Dinuba and Reedley.

   e. State Highway 180 between Minkler and Fresno, inclusive.

   f. U.S. Highway 40 between Richmond and Sacramento, inclusive.

   g. U.S. Highway 50 between Castro Valley and Stockton, inclusive.

   h. State Highway 120 between its junction with U.S. Highway 50 near Tracy and Manteca, inclusive.

i. State Highway 4 between its junction with U.S. Highway 40 near Pinole and Stockton, inclusive.

j. State Highway 24 between Oakland and Sacramento, inclusive.

4. Through Routes and rates may be established between any and all points described in subparagraphs 1 through 3 (j) above subject to the Restriction below.

5. Applicant may operate over and along the following routes for operating convenience only serving no intermediate or off-route points:

a. U.S. Highway 101 and 101 Alternate between the Los Angeles Basin Territory and the San Francisco Territory.

b. State Highway 152 between Gilroy and Califa.

RESTRICTION: Except for shipments originating in Pittsburg, no shipment shall be transported which has both origin and destination at points north of Fresno.

Applicant shall not transport any shipments of:

1. Used household goods and personal effects not packed in accordance with the crated property requirements set forth in paragraph (d) of Item No. 10C of Minimum Rate Tariff No. 4-A.

2. Automobiles, trucks and buses, viz.: new and used, finished or unfinished passenger automobiles (including jeeps), ambulances, hearses and taxis; freight automobile chassis, trucks, truck chassis, truck trailers, trucks and trailers combined, buses and bus chassis.

3. Livestock, viz.: bucks, bulls, calves, cattle, cows, dairy cattle, ewes, goats, hogs, horses, kids, lambs, oxen, pigs, sheep, sheep camp outfits, sows, steers, stags or swine.

4. Commodities when transported in bulk in dump trucks or in hopper-type trucks.

5. Commodities when transported in motor vehicles equipped for mechanical mixing in transit.

6. Logs.

PART II

LOS ANGELES BASIN TERRITORY includes that area embraced by the following boundary: Beginning at the point the Ventura County-Los Angeles boundary line intersects the Pacific Ocean; thence northeasterly along said county line to the point it intersects State Highway No. 118, approximately two miles west of Chatsworth; easterly along State Highway No. 118 to Sepulveda Boulevard; northerly along Sepulveda Boulevard to Chatsworth Drive; northeasterly along Chatsworth Drive to the corporate boundary of the City of San Fernando; westerly and northerly along said corporate boundary to McClay Avenue; northeasterly along McClay Avenue and its prolongation to the Angeles National Forest boundary; southeasterly and easterly along the Angeles National Forest and San Bernardino National Forest boundary to the county road known as Mill Creek Road; westerly along Mill Creek Road to the county road 3.8 miles north of Yucaipa; southerly along said county road to and including the unincorporated community of Yucaipa; westerly along Redland Boulevard to U.S. Highway No. 99; northwesterly along U.S. Highway No. 99 to the corporate boundary of the City of Redlands; westerly and northerly along said corporate boundary to Brookside Avenue; westerly along Brookside Avenue to Barton Avenue; westerly along Barton Avenue and its prolongation to Palm Avenue; westerly along Palm Avenue to La Cadena Drive; southwesterly along La Cadena Drive to Iowa Avenue; southerly along Iowa Avenue to U.S. Highway No. 60; southwesterly along U.S. Highways Nos. 60 and 395 to the county road approximately one mile north of Perris; easterly along said county road via Nuevo and Lakeview to the corporate boundary of the city of San Jacinto; easterly, southerly and westerly along said corporate boundary to

San Jacinto Avenue; southerly along San Jacinto Avenue to State Highway No. 74; westerly along State Highway No. 74 to the corporate boundary of the City of Hemet; southerly, westerly and northerly along said corporate boundary to the right of way of The Atchison, Topeka & Santa Fe Railway Company; southwesterly along said right of way to Washington Avenue; southerly along Washington Avenue, through and including the unincorporated community of Winchester to Benton Road; westerly along Benton Road to the County road intersecting U.S. Highway No. 395, 2.1 miles north of the unincorporated community of Temecula; southerly along said county road to U.S. Highway No. 395; southeasterly along U.S. Highway No. 395 to the Riverside County-San Diego County boundary line; westerly along said boundary line to the Orange County-San Diego County said boundary line; southerly along said boundary line to the Pacific Ocean; northwesterly along the shoreline of the Pacific Ocean to point of beginning.

PART III

SAN FRANCISCO TERRITORY includes all the City of San Jose and that area embraced by the following boundary: Beginning at the point of the San Francisco-San Mateo County boundary line meets the Pacific Ocean; thence easterly along said boundary to a point 1 mile west of U.S. Highway 101; southerly along an imaginary line 1 mile west of and paralleling U.S. Highway 101 to its intersection with Southern Pacific Company right of way at Arastradero Road; southeasterly along the Southern Pacific Company right of way to Pollard Road, including industries served by the Southern Pacific Company spur line extending approximately 2 miles southwest from Simla to Permanente; easterly along Pollard Road to W. Parr Avenue; easterly along W. Parr Avenue to Capri Drive; southerly along Capri Drive to E. Parr Avenue; easterly along E. Parr Avenue to the Southern Pacific Company right of way; southerly along the Southern Pacific Company right

of way to the Campbell-Los Gatos city limits; easterly along said limits and the prolongation thereof to the San Jose-Los Gatos Road; northeasterly along San Jose-Los Gatos Road to Foxworthy Avenue; easterly along Foxworthy Avenue to Almaden Road; southerly along Almaden Road to Hillsdale Avenue; easterly along Hillsdale Avenue to U.S. Highway 101; northwesterly along U.S. Highway 101 to Tully Road; northeasterly along Tully Road to White Road; northwesterly along White Road to McKee Road; southwesterly along McKee Road to Capitol Avenue; northwesterly along Capitol Avenue to State Highway 17 (Oakland Road); northerly along State Highway 17 to Warm Springs; northerly along the unnumbered highway via Mission San Jose and Niles to Hayward; northerly along Foothill Boulevard to Seminary Avenue; easterly along Seminary Avenue to Mountain Boulevard; northerly along Mountain Boulevard and Moraga Avenue to Estates Drive; westerly along Estates Drive, Harbord Drive and Broadway Terrace to College Avenue; northerly along College Avenue to Dwight Way; easterly along Dwight Way to the Berkeley-Oakland boundary line; northerly along said boundary line to the campus boundary of the university of California; northerly and westerly along the campus boundary of the University of California to Euclid Avenue; northerly along Euclid Avenue to Marin Avenue; westerly along Marin Avenue to Arlington Avenue; northerly along Arlington Avenue to U.S. Highway 40 (San Pablo Avenue); northerly along U.S. Highway 40 to and including the City of Richmond; southwesterly along the highway extending from the City of Richmond to Point Richmond; southerly along an imaginary line from Point Richmond to the San Francisco Waterfront at the foot of Market Street; westerly along said waterfront and shore line to the Pacific Ocean; southerly along the shore line of the Pacific Ocean to point of beginning.

(*) HEAVY TRANSPORT, INC.
Certificate of Public Convenience & Necessity
MC 14138 (Sub-No. 4)*

(A) MACHINERY, EQUIPMENT, MATERIALS AND SUPPLIES incidental to or used in the construction, exploration, development, operation, refining, production and maintenance of facilities for the discovery, development, production, or refining of natural gas, petroleum and petroleum products.

(B) MACHINERY AND EQUIPMENT of unusual size or weight.

(C) PROPERTY OR COMMODITIES of unusual size and weight requiring use of special equipment.

(D) BUILDING CONTRACTOR'S EQUIPMENT.

(E) GRADING AND PAVING EQUIPMENT.

(F) ELECTRICAL TRANSMISSION EQUIPMENT.

(G) WATER WELL DRILLING EQUIPMENT.

(H) MINING MACHINERY AND EQUIPMENT.

(I) FABRICATED STRUCTURES, TANKS AND HANGARS.

(J) SUCH MATERIALS AND SUPPLIES as are appurtenant to or a necessary part of the machinery, equipment and property herein authorized to be transported in subparagraphs (b) to (j) inclusive, but not building or construction materials and supplies generally used in the various building and construction businesses.

From, to and between all points on or within fifty road miles laterally of the following routes:

U.S. Highway 101, 101 By-Pass and 101 Alternate, between the Mexican border and King City.
U.S. Highway 99 between the Mexican border and Madera.
U.S. Highway 6 between Los Angeles and Benton Station.

U.S. Highway 395 between San Bernardino and Inyokern.
U.S. Highway 127 between Baker and Nevada state line.
U.S. Highway 466 between Barstow and Nevada state line.
U.S. Highway 66 between Los Angeles and Needles.
U.S. Highway 70 between Los Angeles and Blythe.
U.S. Highway 80 between San Diego and Winterhaven.

By tacking authorities named above and in through interchange service, protestant and its connecting carriers can perform a transportation service for airplane and missile parts and commodities requiring special equipment between points and places in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas on the one hand and, on the other, Points and Places in Washington, California, and Arizona. Commodities requiring special equipment do include such commodities when they contain Class A & B Explosives.

Protestant hauls commodities on Government bills of lading. Below is a record of the revenue earned by month on shipments moving on Government bills of lading for the year ending as listed:

May 1967	$ 251,477
June 1967	361,704
July 1967	245,328
August 1967	304,412
September 1967	251,216
October 1967	253,525
November 1967	207,735
December 1967	238,578
January 1968	294,862
February 1968	266,041
March 1968	288,126
April 1968	298,016
TOTAL	$3,261,020

It is impossible to actually analyze the movement within the available time. However, below is the revenue earned within this period originating within the territory sought:

California	$ 628,533
Texas, Kansas, Okla., Arkansas	616,502
Louisiana	35,529
Other States Involved	164,111
TOTAL	$1,444,675

Exhibit No. 1 lists Protestant's equipment. The trailer equipment consists of flatbeds, dropframes, lowboys, vans all of which are adaptable to transport the commodities herein involved which Protestant is authorized to haul.

Exhibit No. 2 lists Protestant's terminals.

Exhibit No. 3 is an Operations Map which pictorially interprets Protestant's authorities.

Protestant is presently hauling commodities requiring special equipment which also contain explosives.

Below is a list of States between which such shipments have moved:

Arkansas	to California
Arizona	to Florida
California	to Connecticut
"	to Florida
"	to Oklahoma
"	to Maryland
"	to Massachusetts
"	to New Jersey
"	to New York
"	to South Carolina
"	to Tennessee
"	to Texas
"	to Virginia
Connecticut	to California

Florida	to California
Florida	to New Mexico
Florida	to Nevada
Louisiana	to California
Maryland	to California
North Carolina	to California
Oklahoma	to California
Pennsylvania	to New Mexico
South Carolina	to California
Virginia	to California
Virginia	to New Mexico

ARGUMENT

The application seeks an extensive grant of authority on a temporary basis. According to the application published the supporting shipper is the Office of Judge Advocate General who Protestant understands to be an attorney for the Army, and, certainly no shipper of freight. The dictionary describes him as "a military legal officer; especially, an officer designated to act as prosecutor at a court-martial".[1]

The movement of Government Freight is controlled by the Military Traffic Management and Terminal Service. This agency knows the availability of equipment. It employs qualified experts at a great cost to the government to perform this needed service. Protestant cannot understand why this agency has been by-passed and their expertise ignored.

Protestant has provided service for the military since the beginning of World War II. It has provided much special equipment to handle delicate government freight.

Protestant has no copy of the supporting document although certain portions have been read to the writer. This document fails to comply with Section 1131.2 (c) of the

[1] Webster's New World Dictionary.

Rules of Practice. It would hardly appear that the Commission can make rules for all parties to follow, and then fail to enforce them simply because the support comes from the Army Attorney.

Section 210a. of Part II of the Interstate Commerce Act provides:

> "Sec. 310a. (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of 180 days, and shall create no presumption that corresponding permanent authority will be granted thereafter."

The Commission's rules under Section 1131.2, Filing of Applications (for temporary authority) have been carefully promulgated to insure compliance with the above section.

During August 26, 1963, Protestant filed an application for commodities requiring special equipment between points and places in California on the one hand, and, on the other, points and places in Texas and New Mexico. Protestant, as Applicant in these proceedings, introduced over fifty witnesses at hearings held in Dallas, Los Angeles, and Washington By Order of December 16, 1966, served December 29, 1966 entitled:

LEONARD BROS. TRANSFER, INC.
EXTENSION CALIFORNIA-TEXAS
103 M.C.C. 263. The full Commission ruled:

> "In view of the large number of carriers shown to be participating in the traffic we will not engage in speculative possibilities. Neither applicant has established on the record that denial of its application will effec-

tively preclude future participation in joint-line movements. For this reason and because of other circumstances, the cases relied upon by applicants are not controlling here.

"Applicants' case in the last analysis rests on the proposition that joint-line service is inherently inadequate. However, as seen, the record here does not establish existing joint-line service as inadequate; and there is presently substantial single-line service. Interline service between two or even among three carriers cannot be said to be per se inadequate particularly where, as here, some very long hauls are involved. See Curtis supra at page 900 and case there cited. While some instances of service considered by the shippers to be unsatisfactory were mentioned, there is no persuasive showing of a pattern of materially unsatisfactory service. *Applicants ask for too much, based on too little.* (emphasis supplied)

If over fifty witnesses, including the National Aeronautics and Space Administration and General Electric Company failed to prove the need for a grant which included only part of the commodities and far less territory, then one lawyer's letter, even though from the Army, would certainly seem that this applicant is asking for too much more based on a lot less.

Respectfully submitted,

/s/ CARL ATHERTON
Carl Atherton
Assistant to Executive Vice President
Leonard Bros. Trucking Co., Inc.
2595 N.W. 20th Street
Miami, Florida

Dated at Miami, Florida
December 12, 1968

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Verified Statement has been forwarded this date by first class mail to the Applicant and Applicant's Representative.

/s/ CARL ATHERTON
Carl Atherton

December 12, 1968

VERIFICATION

STATE OF FLORIDA }
COUNTY OF DADE } ss:

Carl Atherton, being duly sworn, deposes and says: that he is the Assistant to the Executive Vice President of Leonard Bros. Trucking Co., Inc.; that he has read the foregoing and knows the contents thereof; that the same are true as stated, except as to matters and things if any, stated on information and belief, and that as to these matters and things, he believes them to be true.

/s/ CARL ATHERTON
Carl Atherton

Subscribed and sworn to before me this 12th day of December 1968.

/s/ JOSEPH W. WHITE, JR.
Notary Public

Notary Public, State of Florida at Large
My Commission Expires Mar. 22, 1972
Bonded Through Fred W. Diestelhorst

EXHIBIT NO. 1

Leonard Bros. Trucking Co., Inc.

Equipment Summary

Equipment Description		In Service
Tractors		
Straight Cab Tractors	21	
Sleeper Cab Tractors	74	
Air-Ride Sleeper Cab Tractors	17	
Total Tractors in Service		137
Trucks		
Lift Gate Trucks	6	
Gin Pole Trucks	5	
Pick-Up Trucks	8	
Total Trucks		19
Trailers		
Single-Axle Flat Bed Trailers	4	
Total Single Axle Trailers		4
Tandem Axle Flat Bed Trailers, Viz:		
Spring Suspension Trailers	26	
Spring Suspension Sliding Tandem Trailers	13	
Spring Suspension Stretch Trailers	7	
Air-Ride Suspension Trailers	1	
Air-Ride Suspension, Sliding Tandem Trailers	18	
Air-Ride Suspension, Stretch Trailers	7	
Total Tandem Axle Trailers		72
Drop Frame Trailers, Viz:		
Spring Suspension Trailers	30	
Air-Ride Suspension Stretch Trailers	9	
Total Drop Frame Trailers		39

Equipment Description	In Service	
Well (Double-Drop Frame) Trailers		
Spring Suspension Trailers	32	
Spring Suspension Stretch Trailers	7	
Air-Ride Suspension Aluminum Constructed Trailers	2	
Air-Ride Suspension Steel Spring Stretch Trailers	3	
Total Well Type Trailers		44
Heavy Duty Lowboy Trailers, Viz:		
Spring Suspension Trailers-Removable Goose Necks	18	
Spring Suspension Trailers-Permanent Deck	1	
Air-Ride Suspension, Stretch Bed Trailers-Removable Goose Necks	7	
Air-Ride Suspension Permanent Deck	1	
Total Heavy Duty Lowboys		27
Van Trailers, Viz:		
Spring Suspension, Level Deck	2	
Spring Suspension, Drop Frame	9	
Spring Suspension, Sliding Tandem	3	
Spring Suspension, Open Top Stretch	1	
Air-Ride, Drop Frame	2	
Air-Ride, Sliding Tandem	6	
Total Vans		23
Pole Trailers		
Telescopic Pole Trailers	6	
Rear Steering Telescopic, Pole Trailers	1	
Total Pole Trailers		7

Equipment Description	In Service	
Aircraft Trailers, Viz:		
Spring Suspension Trailers	1	
Air-Ride Suspension Trailers	2	
Air-Ride Suspension Stretch Bed Trailers	4	
Spring Suspension, Single Axle, Double Drop	2	
Total Aircraft Trailers		9
Total Trailers		225
Accessorial Equipment		
Jeep Dollies	21	
House Moving Dollies	16	
Cargo Boxes	14	
Service Cars	4	
Sales Cars and Escort Vehicles	21	
Fork Lifts	26	
Mobile Cranes Up to 100 Ton Capacity	19	
Two Way Radios	26	
Propeller Jigs for Ships' Propellers Up to 30 Ton Capacity	7	
Extra Axle Attachments (Air-Ride for Lowboys)	6	
Extra Axle Attachments for Flatbed Trailers	2	
Total Accessorial Equipment		162

LEONARD BROS. TRUCKING CO., INC.

Terminal List

ORLANDO, FLORIDA 32805
2411 South Orange Blossom Trail
Telex: 051-4127
Phone: AC 305—841-1415

COCOA, FLORIDA 32922
6 Miles South of Cocoa on U. S. #1
Phone: AC 305—636-2420

STOCKTON, CALIFORNIA 95209
5500 South Airport Way
WU FAX-7289
Phone: AC 209—931-5533

LOS ANGELES, CALIFORNIA
9235 Wilshire Street
Rosemead, California 91770
Telex: 674-4357
Phone: AC 213—285-2535

CHARLESTON HEIGHTS, S. C.
P. O. Box 7215—Zip 29405
Phone: AC 803—722-1653

MACON, GEORGIA 31206
5700 Houston Road
Phone: AC 912—788-2460
(Warner Robins, Georgia)

MIAMI, FLORIDA 33152
2595 N. W. 20th Street
Telex: 051-527
General and Executive Offices
Long Haul Over-The-Road
AC 305—634-2551
Pickup and Delivery AC 305—633-6611
Local Trucking—Riggers—and
Crane Rental AC 305—635-0346

GRAHAM, TEXAS 76050
[illegible] Main Street
WU [illegible]
Phone: AC 214—549-2443

SAN ANTONIO, TEXAS 78205
1776 S. San Marcos St.
Phone: AC 512—CA 7-2221

PENSACOLA, FLORIDA 32502
4451 Pensacola Boulevard
Telex: 056-8114
General Dispatch and Truck Traffic
Information Center AC 904—476-7020
Local Pickup and Delivery
and Interstate AC 904—476-7024

GRANBURY, NEW JERSEY 08512
U. S. Route 130, North
Telex: 834-3452
Phone: AC 609—395-0125

WAYS Lines

MAIL DIRECT TO YOUR NEAREST

LEONARD BROS. OFFICE

Five Locations For Your Convenience

I

General Dispatch and
Truck Traffic Information Center

PENSACOLA, FLA.

Intermidie Inbound WATS Line . . .

800-874-0234

II

New England & Mid Atlantic States
Area Dispatch Office

CHARBURY, N. J.

Inbound WATS Line . . . 800-257-7034

III

Southwest & Midwest Area Dispatch Office

DALLAS, TEXAS

Inbound WATS Line . . . 800-527-0520

IV

from any point in Florida to the
North and Central Florida Dispatch Office

ORLANDO, FLA.

Inbound WATS Line . . . 800-432-5805

V

from any point in Florida to the
General Office and South Florida Dispatch Office

MIAMI, FLA.

Inbound WATS Line . . . 800-432-5021

LEONARD BROS. TRUCKING CO., INC.

General Offices
2595 N.W. 20th Street
P.O. Box 402, Miami, Florida 33152

EXHIBIT NO. 2

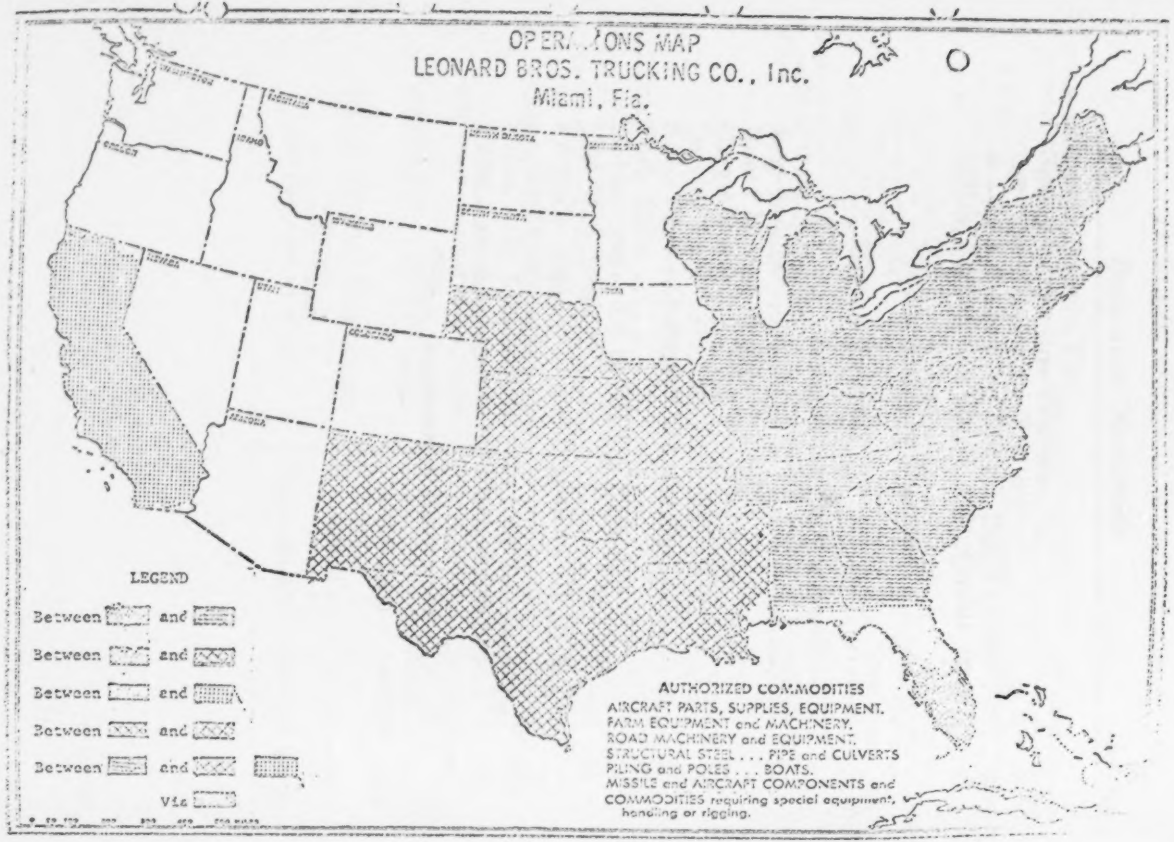
OPERATIONS MAP
LEONARD BROS. TRUCKING CO., Inc.
Miami, Fla.
LEGEND
Between and
Between and
Between and
Between and
Between and
Via
AUTHORIZED COMMODITIES
AIRCRAFT PARTS, SUPPLIES, EQUIPMENT.
FARM EQUIPMENT and MACHINERY.
ROAD MACHINERY and EQUIPMENT.
STRUCTURAL STEEL . . . PIPE and CULVERTS
PILING and POLES . . . BOATS.
MISSILE and AIRCRAFT COMPONENTS and
COMMODITIES requiring special equipment, handling or rigging.

EXHIBIT NO. 3

Before The
INTERSTATE COMMERCE COMMISSION

American Farm Lines
MC-129908 TA

Statement of Position of Merchants Fast Motor Lines, Inc. and Renewal of Motion To Vacate Order of November 5, 1968, of Division 1, Acting as an Appellate Division

To the Interstate Commerce Commission:

Merchants Fast Motor Lines, Inc. submits herewith its statement of position in connection with ths status of the above captioned application, and simultaneously renews its motion to vacate and set aside the Order of Division 1, acting as an Appellate Division, entered November 5, 1968, and in support thereof would show the following:

I.

On September 3, 1968, Division 1, acting as an Appellate Division, reversed a prior Order of the Temporary Authorities Board and granted American Farm Lines, herein referred to as applicant, temporary authority for ninety days authorizing motor carrier operations in the transportation of general commodities, including classes A and B explosives, moving on Government bills of lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Utah and Arizona.

II.

Merchants Fast Motor Lines, Inc., herein referred to as Merchants, filed a petition seeking reconsideration of the Order of Division 1, granting the application, contending therein that applicant had failed to establish that an immediate and urgent need existed for the proposed service. Additionally, numerous other petitions for reconsideration of the Order of grant were filed by other car-

riers. On October 17, 1968, applicant made reply to the petitions for reconsideration and included therein a request to re-open the record in this proceeding for the purpose of introducing additional matters, including evidence offered by the Department of Defense. The evidence which applicant seeks to introduce is contained in a so-called "Reply" filed by the Department of Defense to protestants' petitions for reconsideration. As of this date, the petition of Merchants for reconsideration, as well as the other petitions, have not been acted on by the Commission.

III.

Notwithstanding the fact that various petitions for reconsideration of the Order of September 3, 1968, were pending, applicant commenced operations, and in order to preserve the status quo, certain of the protesting carriers, on September 25, 1968, filed a complaint in the United States District Court for the Western District of Washington, seeking to set aside the Order of grant. On October 3, 1968, the Court, in Civil Action No. 3828, Black Ball Freight Service, et al. vs. United States, issued a temporary restraining order enjoining the September 3, 1968 Order from going into effect or otherwise becoming operative.

IV.

On November 5, 1968, Division 1, acting as an Appellate Division, reopened these proceedings for the purpose of receiving a verified statement from the Department of Defense. As basis for this Order, Division 1 found that the reply filed by the Department of Defense to protestants' petitions for reconsideration contained "additional reasons indicating an immediate and urgent need for applicant's service which cannot be met by existing carriers," and as this "additional evidence" was not part of the original record, Division 1 ordered the proceedings reopened.

V.

On December 2, 1968, Merchants served a "Petition for Reconsideration and Motion to Vacate Order," con-

tending therein that the November 5, 1968 Order of Division 1, reopening the record, was null and void for the following reasons: (a) the procedures prescribed by the Commission's duly promulgated rules and regulations for reopening the record in this proceeding were not followed. (b) by virtue of appeal, the Commission has lost jurisdiction over any phase of this proceeding until the Court has terminated its jurisdiction and the case has been remanded to the Commission; and (c) the action of the applicant and the Department of Defense in seeking to introduce new evidence and the action of the Commission in undertaking to receive this new evidence are evidently an attempt to modify or change the prior Order of September 3, 1968, and constitute a violation of the Court's temporary restraining order.

VI.

The Order of November 5, 1968, sets the date of December 6, 1968, as the date for the filing of verified statements by protestants in response to any statement submitted by the applicant. The Department of Defense has filed a verified statement pursuant to this Order. The due date for replies to this statement has been extended to December 13, 1968.

VII.

Merchants has determined not to submit a verified statement in reply to the statement filed by the Department of Defense for the following reasons:

(1) Merchants has presently pending a petition for reconsideration and motion to vacate the Order of November 5, 1968, reopening this proceeding and until this petition is acted upon one way or another, it is the position of Merchants that the statement of the Department of Defense is not properly before the Commission;

(2) Merchants is fearful that the filing of a reply to the verified statement of the Department of Defense would constitute a waiver of its objection to the Commission's action in reopening this record and acquiescence in highly

irregular procedures utilized by the Commission in issuing the Order of November 5, 1968;

(3) In the event the pending petition of Merchants is overruled, the Order reopening this proceeding affirmed, and the verified statement of the Department of Defense received, —Merchants Fast Motor Lines, Inc. does not deem a reply necessary for the reason that the verified statement does not comply with certain rules and regulations of the Commission, particularly 49 CFR § 1131.2(c) which provides:

> "Any such supporting statement must contain at least the following information:
>
> ". . . . .
>
> "(8) Whether efforts have been made to obtain the service from existing motor, rail or water carriers, and the dates and results of such efforts.
>
> "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

WHEREFORE, Merchants Fast Motor Lines, Inc. reurges its motion for the vacation of the Order of November 5, 1968, and prays for such other and further relief to which it may show itself to be entitled.

Respectfully submitted,

REAGAN SAYERS
Reagan Sayers
CLAYTE BINION
RAWLINGS, SAYERS & SCURLOCK

Century Life Building
P.O. Box 17007
Forth Worth, Texas 76102

Attorneys for Merchants Fast Motor Lines, Inc., Protestant

Due Date: December 13, 1968

Before The
INTERSTATE COMMERCE COMMISSION

In the Matter of:

AMERICAN FARM LINES—TEMPORARY AUTHORITY APPLICATION

Docket No. MC-129908 TA

Verified Statement of Arthur J. Sibik

My name is Arthur J. Sibik, and my business address is 7000 South Pulaski Road, Chicago, Illinois. I am Assistant Traffic Manager of Midwest Emery Freight System, Inc. (Midwest Emery) and its wholly owned subsidiary, Little Audrey's Transportation Co., Inc. (Little Audrey's). I have held this position for many years, and in connection with my position with these two companies, I handle rates, routings, appearances before the Interstate Commerce Commission, and all other normal traffic functions. It is necessary that I be and I am thoroughly familiar with the operations of both Midwest Emery and Little Audrey's. Because of my familiarity and position with Midwest Emery and Little Audrey's, I am submitting this verified statement on behalf of both companies, pursuant to the directions of the Commission in its Order, served November 9, 1968, in the above captioned matter.

All protestants to the subject application for temporary authority were required to submit verified statements in response to any statement submitted by applicant in accordance with the Commission directive in the above-cited Order reopening the proceeding on the Commission's own motion for the purpose of receiving a verified statement from the supporting shipper, the Department of Defense, in which the shipper was directed to specify the commodities and points between which there purportedly is an immediate and urgent need for the proposed service which cannot be met by existing carriers. Accordingly,

the instant statement is filed in response to the statement filed by the Department of Defense.

The interest of protestants herein have previously been spelled out in their protests and other pleadings filed in this proceeding, and it is respectfully requested that these pleadings be incorporated in the instant statement by reference, to avoid repetition. Suffice it to state here that both protestants are interested primarily in the transportation of foodstuffs, both raw and manufactured, including beef, meat products, meat by-products, and articles distributed by meat packing houses, from, to and between some or all points collectively in Indiana, Illinois, Missouri, Oklahoma, Kansas, Washington, California, Nevada and Arizona.

It would appear, from a reading of the shipper's verified statement to which this pleading is addressed, that the only commodities which the Department of Defense is interested are Class A and B explosives and related dangerous articles, classified by the shipper as "DOD traffic" (see statement of shipper, pp. 1, 2, 5-6, 9, 11, 13, 15, 16, 17-18 and 20). Protestants, of course, are not interested in the transportation of such commodities, in a grant of authority to applicant encompassing the transportation of explosives, munitions, ammunition, and related items, within the application territory, would have no adverse competitive effect on the operations of protestants. The only mention by the supporting shipper of any article beyond the scope of Class A and B explosives and related items appears on Pages 17-18 of its statement when some vague reference is made to the purported desirability of formulating truckload shipments which are composed in part of explosives and in part of "various other types of commodities that are normally referred to as 'freight, all kinds' ". It would appear, however, that the only commodities beyond the scope of explosives, ammunition, etc., that the shipper would be interested in moving would be paper articles, boots, shoes and canned

fruits, vegetables, and dried fruits (statement of shipper, p. 6). Nowhere in this statement, however, is the volume of such nonexplosive traffic specified, nor are we favored with any salient details respecting the origin and destination points from and to which such traffic would be moved, or the frequency with which such traffic would be handled in mixed shipments with explosive articles.

In these circumstances, the verified statement of the Department of Defense falls far short of the specific directive of the Commission, in its Order on November 5, 1968, requiring the shipper to specify the probative details concerning its traffic patterns which the instant proposal for temporary authority is purportedly designed to accommodate. Accordingly, it is difficult, if not impossible, for protestants herein to be specific with respect to setting forth the precise scope of the service provided by its opposing carrier here and that would conflict with the instant proposed service, in light of the fact that the instant verified statement of the supporting shipper is couched in the most vague and general of terms with respect to that undisclosed, and probably minimal portion of its overall traffic consisting of foodstuff items in which protestants herein vitally are interested.

Suffice it to state for our purposes that no complaint against either Midwest Emery's or Little Audrey's services was set forth in the shipper's statement. Midwest Emery constantly solicits traffic within the scope of the instant application to the extent of its authority, and has participated in the movement of some LTL lading to this extent. Likewise, Little Audrey's constantly solicits business within the scope of its operating rights, and at present is handling volume meat shipments from its authorized origins from points in such States as Illinois, Missouri, Oklahoma, Kansas, and Indiana to points in Washington and California. These shipments moved to points in the involved western States for further overseas movement as well as directly to military installations

in these States, even though such shipments are not handled on government bills of lading.

Protestants herein are ready, willing and able to perform reliable and expeditious transportation services for the movement of both LTL and truckload shipments with their existing equipment, facilities, and highly trained staff within the scope of their operating authorities. On Page 21 of his statement, the shipper discusses a shipment of "freight of all kinds", without further disclosure of the identity of the lading, from Edwardsville, Illinois to Vallejo, California, which purportedly was handled satisfactorily by applicant, and which the shipper considers could not have been handled satisfactorily by any other existing carrier. Actually, protestants could have handled the movement, to the extent that it included commodities within the scope of their respective authorities, in a through-trailer interline service providing the required 3-day time in transit and a weekend delivery. The shipper's blanket indictment for all currently authorized carriers with respect to times in transit cannot be made applicable to all of those presently authorized carriers, including protestants herein, which have not been favored with any traffic from this shipper to date.

In summary, I would urge the Commission to find that the supporting shipper's current verified statement indicates at best a need for the transportation of Class A and B explosives, and related items, and any grant of authority rewarded the applicant herein be so limited in terms of the commodities authorized to be handled. Certainly, these particular commodities are the only ones specified throughout the shipper's statement as those products for which it is alleging a need for transportation.

I would further urge the Commission to find that applicant has failed to make even a *prima facie* case for that portion of its proposed service involving the transportation of any commodities other than Class A and B explosives

and related items, under the rules annunciated by the Commission concerning the minimum evidence required of applicant for proposals to institute a new and competitive service. See e.g. *Novak—Contract Carrier Application*, 103 M.C.C. 555. Should any grant of authority ultimately awarded to applicant herein encompass any other products than Class A and B explosives, and related items, then such grant clearly should be limited to the handling of non-explosives traffic only when moving in mixed loads with Class A and B explosives and related items in the same vehicle and at the same time. Any other result would be to authorize a new and competitive service to the severe and material detriment of hundreds of carriers in the affected territory including protestants, which have spent millions of dollars in acquiring and developing authorities, equipment and facilities in order to build up a profitable operation within their authorized territories.

I have read the above and foregoing statement, and to the best of my knowledge, the statements contained therein are true and correct.

ARTHUR J. SIBIK
Arthur J. Sibik

Assistant Traffic Manager
Midwest Emery Freight
System, Inc. and Little
Audrey's Transportation Co.,
Inc.

Subscribed and sworn to before me this 5th day of December, 1968.

ROSALIE L. GOLDEN
Notary Public

BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET No. MC-129908 TA

In the Matter of:

TEMPORARY AUTHORITY APPLICATION OF
AMERICAN FARM LINES

Motion To Vacate Order and Reject Verified Statement

Comes now Munitions Carriers Conference, Inc., which is protesting this application on behalf of approximately 40 motor carriers of Classes A and B explosives throughout the United States, and respectfully moves the Commission to vacate an Order of Appellate Division 1 entered November 5, 1968 (referred to herein as the November 5 Order) and to reject a document dated November 20, 1968, entitled "Verified Statement of Vincent F. Caputo," and filed by the Judge Advocate General of the Army on behalf of the Department of Defense (hereinafter referred to as the Verified Statement).

STATEMENT

Division 1 granted the authority sought in this proceeding by an Order entered September 3, 1968, which reversed the order of the Temporary Authorities Board and overruled the protests of over 120 motor and rail carriers which indicated that collectively they could perform all of the service proposed. Although numerous petitions for reconsideration of that decision are still pending, Division 1 refused to stay the effectiveness of its order, so that several of the protestants had no choice but to challenge the decision before a Federal District Court, which temporarily restrained the effectiveness of the Division's order. That court action is still pending. To our knowledge, the Commission has made no claim that its decision of September 3, 1968, was not administratively final or that the proceed-

ing was not ripe for judicial review. In the meantime, applicant apparently recognized that the record is legally insufficient to support the Division's grant of temporary authority and on October 17, 1968, it petitioned to reopen the record for the receipt of additional material, principally that contained in a document entitled "Reply to Petitions for Reconsideration," dated October 16, 1968, and filed in this proceeding by the Department of Defense (DOD).

Unlawful Procedure

The November 5 Order does not by its terms grant applicant's petition to reopen, but states that it is an action taken on the Division's own motion as a result of the filing by DOD of the reply described above. The November 5 Order goes beyond applicant's request and grants DOD *carte blanche* to submit not only the material contained in its October 16, 1968, reply, but also any additional matter which it might see fit to produce. It invites DOD to "specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers." Obviously, if such essential information had been contained in the record upon which the Division based its original grant of authority, there would be no present necessity for such specification.

The Commission established in Ex Parte No. MC-67, *Motor Carrier Temporary Authorities,* 98 M.C.C. 483 (1965), a complete written hearing procedure for the disposition of temporary operating authority applications, and having established such regulations, it may not lawfully allow one party to a proceeding to ignore or depart from them. The record, such as it is, was made *before* the Division granted this application, and that grant could not properly have been based upon anything not in the record. This is not a situation where the Commission is

attempting to retract a decision which has been appealed for the purpose of restudying the existing record, reconsidering its decision, and rewriting its opinion. On the contrary, it appears to be an attempt to afford applicant an opportunity, *nunc pro tunc,* to place into a record new evidentiary material which was not in that record when the Division made its determination. In other words, applicant is to be allowed to try to find evidence to support a decision after the decision has been made and even after it has been appealed to a Federal Court. There is no basis in the law for such an action. The Division cannot now recapture this case from the District Court and allow the applicant an opportunity to beef up the record upon which the decision was based. Administrative due process does not permit an agency to make a determination upon an existing record and *thereafter* receive evidence to support that determination. The November 5 Order was in excess of the Commission's authority and should be vacated.

VERIFIED STATEMENT

Original Allegations Abandoned

Although the stated reason for the November 5 Order was that DOD's reply of October 16, 1968, "specified additional reasons indicating an immediate and urgent need for applicant's service which cannot be met by existing carriers," it is highly significant that those alleged reasons are not even mentioned in DOD's Verified Statement filed in response to the November 5 Order. The reply referred to contained only three allegations concerning DOD's alleged need for motor-carrier service. One of those was a complaint which did not identify the originating carrier so that it could be verified. A second allegation was that applicant American Farm Lines had been given "most of the shipments" moving between the Louisiana Army Ammunition Plant at Doyline, La., and Port Chicago, Calif. In protestant's reply and motion to strike, the accuracy of

that statement was challenged. Finally, there was one specific identifiable complaint against existing service in that pleading. The carrier charged replied and submitted photostatic copies of documents which established that the charge was false. By failing to restate and support the allegations of its reply, DOD has in effect abandoned the very allegations upon which the Division acted.

Generalities

Being unable to substantiate those so-called specifications of immediate and urgent need and having abandoned them, the Verified Statement now advances a whole new set of arguments. Again, however, they are primarily generalities, despite the *direction* in the November 5 Order to "specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers." Thus, even if the November 5 Order were proper, this Verified Statement does not comply with it and should also be rejected for that reason. If true, these unsupported generalities still go only to the question of adequacy of existing service and in no way establish, nor is there any specific claim in the Verified Statement that they establish, an immediate and urgent need which cannot be met by existing carriers.

For example, the Verified Statement points out that DOD requires service for the movement of vast quantities of traffic between the involved territories. (pp. 4-6) It states that a "majority" of the available service is joint-line, that "virtually all" authorized carriers operate over regular routes, and that "some" of these carriers use single drivers instead of two-man driving teams. (pp. 7-8) On their face, these are obvious generalities. To say that a "majority" or "some" of existing carriers have alleged defects in their service is not enough to establish a need for new service under section 207, much less to establish an "immediate and urgent need" under section 210a(a).

Moreover, protestant denies that these are true inadequacies in existing service. Contrary to DOD, many of the largest motor carriers of explosives operate over irregular routes. To the extent that explosives carriers lack single-line authority, their joint-line service usually involves interchange of equipment so that the lading can move from origin to destination without transfer. Explosives carriers generally afford two-man driver teams where requested, and many provide such service as a matter of course.

On page 11 of its Verified Statement, DOD makes the astounding claim that there is an immediate and urgent need for applicant's service because no carrier holds single-line authority for *all* commodities (that is, general commodities *without exception*) between *all* points in any of the States sought by applicant. Again, this has nothing to do with the issue of immediate and urgent need, but in addition, the Commission has consistently held that no shipper is automatically entitled to single-line service between all points on all commodities. Although DOD claims that it has been forced to "live with" the existing situation, protestant believes a check of its records would disclose that DOD has over the years accepted the Commission's policy as a sound one and has refused to support numerous applications by motor carriers which would have given it single-line service on various commodities between various points. Now, however, it would have the Commission believe that it belatedly seeks to remedy an untenable situation which has existed for many years by supporting this formerly "exempt" operator. We suggest that some of DOD's earlier submissions in this proceeding were more candid when they admitted that its support is based upon cost considerations and not service.

Considerable is made in the Verified Statement of DOD's use of applicant as a purportedly exempt farm cooperative. The fact that a person has provided unauthorized service,

even though that service included unidentified "transportation niceties" (Verified Statement, p. 19), is no warrant for a finding of immediate and urgent need for the continuation of such unlawful operations in the face of a plethora of existing certificated carriers. Protestant takes vigorous exception to the claim (p. 19) that the unauthorized operations of American Farm Lines were used "to complement rather than replace" certificated carriers. The facts are that American Farm Lines has been DOD's preferred carrier on truckload shipments (it does not have LTL rates on file) and that diversion of traffic from several certificated carriers was established to the satisfaction of the Federal Court which enjoined American Farm Lines' unlawful operations.

No Specifics

To what extent does the Verified Statement "specify" commodities and points as required by the November 5 Order? Protestant has abstracted and lists below each allegation which could conceivably fall into the category of a specific complaint. Examination of these statements makes it clear that the November 5 Order has not been complied with, because they are either not complaints at all or cannot, because of their lack of specificity, be verified or refuted by the carriers involved.

1. Explosives from McAlester, Okla., to Bangor, Wash. (Verified Statement, p. 9) According to the Verified Statement, some such shipments are in transit from six to eleven days. However, third-morning service (which is apparently satisfactory) is admittedly available for such shipments, and it must be assumed that the certificated carrier providing that service is providing an adequate service. This statement is not even a complaint against existing service, and it certainly does not establish by the wildest stretch of the imagination an immediate and urgent need for the certification of a new carrier.

2. Empty shell cases from San Jose, Calif., to Doyline, La. (Verified Statement, p. 9) Again, the Verified Statement admits that some existing carriers provide 72-hour service on such shipments, and in the absence of a claim that such service is unsatisfactory, this statement cannot be construed as a complaint against existing service.

3. Various types of commodities from St. Louis, Mo., to points in California. (Verified Statement, p. 10) It is not true that the "only" certificated service from St. Louis, Mo., is of a regular-route nature. However, it is impossible for the parties or the Commission to know what DOD is talking about when it refers to 'various" commodities, unidentified carriers, and unspecified transit times.

4. Pages 12 through 14 of the Verified Statement list 11 groups of points between which there is allegedly no single-line service authorized to transport "DOD traffic." In the first place, if it is true, the mere absence of a single-line carrier between two points is not a basis for the finding required by section 210a(a). More important here is the fact that the commodities are described as "DOD traffic." This appears to be a device utilized throughout the Verified Statement to gloss over what are essentially inaccurate generalizations. Without checking the thousands of certificates involved, it is fairly safe to assume that there may be no one carrier certificated between various of these points to transport general commodities *without exceptions,* that is, all freight including explosives, commodities in bulk, household goods, etc. "DOD traffic" includes commodities in the latter categories as well as general freight. Thus, the use of the term "DOD traffic" as the basis for these allegations of absence of single-line service may make them technically correct, but they are nevertheless, we submit, very misleading. Protestant is unable to find in the Verified Statement any real support for a claim that a *single* carrier must hold authority to transport all commodities, including the specialized cate-

gories enumerated above. Although there are some exceptions, the Commission has historically restricted the certificates of general commodity carriers against the transportation of certain of these specialized commodities, including explosives and other dangerous articles. See *Classification of Motor Carriers of property,* 2 M.C.C. 703, 713-714 (1937). The Verified Statement makes a half-hearted effort to overcome the historical distinctions among types of carriers by saying that it is "at times desirable" to mix explosives and general freight in the same vehicle. (Verified Statement, pp. 17-18) This may, of course, be true because we do not know what "at times" means. Certainly, a need which develops only "at times" or now and then is not an immediate and urgent need. Moreover, as a general proposition, protestant believes that there is no actual mixing nor any need to mix such freight, and that operational conditions involved in the transportation of explosives, including specially trained drivers, placarding, observance of additional safety regulations, restrictions against the use of certain highways, the necessity for avoidance of congested areas, special equipment in some cases, etc., militate against the mixing of explosives in a load of general freight.

5. Shell cases from San Jose, Calif., to Doyline, La., and Pine Bluff, Ark. (Verified Statement, p. 16) (See also item 2, *supra.*) The Verified Statement alleges that the movement of shell cases must be coordinated with production at the two destinations named and that although "every possible" routing has been used for these movements, only one of the existing carriers is able to provide the "timed" delivery necessary and it is not capable of handling all the traffic. It would seem that simple fairness would dictate identification of this carrier, but this protestant believes it sufficient from its standpoint to point out that the commodity involved is not an explosive.

6. Shipments from St. Louis, Mo., to San Francisco, Calif. (Verified Statement, p. 17) At this point, DOD

says that an unknown number of unidentified carriers have on an unknown number of unspecified occasions failed to provide three-day transit time on shipments of unidentified commodities. This hardly satisfies the requirement that DOD "specify" what it is complaining about.

7. On pages 20 and 21 of the Verified Statement, five instances of purportedly exempt service provided by applicant are given, and it appears that existing service was not tried on these occasions because of some unidentified "experience" of DOD. Only the first of these five movements is identified as involving explosives. (p. 20) It was 22 truckloads of small arms ammunition from Lake City, Mo., to Port Chicago, Calif., and the transit-time requirement was exactly *one month*. Protestant cannot help but be incredulous about a claim that no regulated carrier could provide the equipment and effect delivery within one month, and it submits that no credence should be given this claim in the absence of identification of the regulated carriers to which this movement was supposedly offered and which could not handle it within one month.

Past Admission

Nowhere in the Verified Statement does the current witness for DOD undertake to reconcile its present position of immediate and urgent need with the fact that on two occasions shortly before this application was filed, *i.e.*, on April 30 and May 10, 1968, responsible officials of DOD (one of them being its counsel in this proceeding) addressed letters to applicant itself and to another carrier stating unequivocally that although DOD would like to retain the services of applicant, it "is not in a position to state that there would be insufficient or inadequate service without American Farm Lines." (These letters are appended in their entireties to protestant's original protest to this application.)

WHEREFORE, protestant submits that the law does not permit the reopening of a closed record, after the decision has been appealed to a Federal District Court, for the purpose of allowing the applicant to beef up that record and supply information, previously missing, which could be claimed to support the Division's earlier decision, and, accordingly, the November 5 Order is unlawful and should be vacated; further, the Verified Statement filed by DOD in response to that Order should be rejected for the same reason and also because it fails to comply with the terms of the Order which require specification of any claimed immediate and urgent need for service which existing carriers are not capable of providing.

Respectfully submitted,

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Dated: December 12, 1968

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC 129908 T/A

AMERICAN FARM LINES
Oklahoma City, Oklahoma

Statement in Response to Verified Statement of the Department of Defense Filed as Per Order of Division 1 Served November 5, 1968

Come now the National Motor Freight Traffic Association, Inc., Regular Common Carrier Conference, and Common Carrier Conference—Irregular Route, and files this statement in response to the statement filed by the Department of Defense. (DOD)

I

HISTORY OF APPLICATION

The Temporary Authorities Board, by Order served July 15, 1968, denied American Farm Lines' application to transport general commodities, including classes A and B explosives, moving on government bills of lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Utah, and Arizona. Applicant filed a petition for reconsideration, and protestants replied thereto. Division 1, acting as an Appellate Division, by order served September 5, 1968, vacated the Board's order and granted the authority as sought. Protestants filed petitions for reconsideration of the Division's grant. As those petitions did not stay the effectiveness of the grant a complaint was filed by certain protestants in the United States District Court, Western District of Washington (*Black Ball Freight Service* v. *United States,* Civil No. 3828, A.D. Washington, October 2, 1968) and the court stayed the effective date of Division 1's order, until further order of the Court.

By Order served October 11, 1968, the Commission stayed the effective date and operation of Division 1's order until further Order of the Commission.

The DOD and American Farm Lines filed replies to protestants' petitions for reconsideration, and the applicant also filed a petition to reopen the record for the purpose of receiving the reply statement of the DOD as part of the evidence.

By Order served November 5, 1968, the Commission, Division 1, acting as an Appellate Division, reopened the proceeding, on its own Motion, for the submission of a verified statement of the DOD and for reply statements from the protestants.

The DOD filed a verified statement on November 20, 1968, and it is to that statement that this reply is directed.

The Order served September 3, 1968, by Division 1 acting as an Appellate Division was the final authorized act which the Commission could take with regard to the instant application, and as such, Division 1 was foreclosed from further action on this matter. The rules governing the procedure are quite clear:

> *49 C.F.R. 1131.4(a)(1)* states that an application for temporary authority is to be processed initially by either the Temporary Authorities Board or by Division 1, acting initially.
>
> *49 C.F.R. 1131.6* states that Petitions for Reconsideration of orders of (1) temporary authorities board, and (2) Division 1 initially may be filed by any person. The only appropriate appellate procedure is a Petition for Reconsideration which would be assigned to Division 1, acting as an appellate division.
>
> *49 C.F.R. 1100.101(a)(2)* states that all decisions, orders, or requirements of a division of the Commission in any proceeding shall be considered administratively

final. It was clearly stated in *Trans American Freight Lines Inc.* v. *United States*, 258 F. Supp. 910:

> "In all instances when an application to reconsider the decision of either a division, individual Commission, or Board was filed with and acted upon by an *appellate division*, its decision was final and no further relief within the Commission was possible."

The rules are quite clear and free from any and all ambiguity. There is no provision in the regulations which allows the admission of evidence in a temporary authorities procedure, after the initial decision by the Temporary Authorities Board. The November 5, 1968, order is, therefore, outside the power and jurisdiction of the Commission.

There are numerous motions on file to vacate and set aside the Order of Division 1, acting as an Appellate Division, served November 5, 1968, and these Motions should have been acted upon before making it necessary for protestants to file replies to this improper and wholly unauthorized Verified Statement of the DOD.

II

Reply of National Motor Freight Traffic Association Inc., Regular Common Carrier Conference, and Common Carrier Conference—Irregular Route, Hereinafter Called "Associations."

At the outset we find that Mr. Caputo feels he is charged with the duties and responsibility for the efficient and economical operation of physical distribution activities of the DOD. He has neglected to state how long he has had these duties and responsibilities; therefore, we must judge his experience and knowledge of these duties by the matters and "facts" he purports to set out. One who has the duties and responsibilities that Mr. Caputo has surely should have an extremely comprehensive knowledge of all common carriers available to him plus knowledge of

any other carriers who might be available to him. Yet, as we read on page 18 of Mr. Caputo's statement:

> ". . . . in the latter part of 1966 when a number of cooperative agricultural associations, including American Farm Lines, made themselves known to Department of Defense and began soliciting its traffic for movement pursuant to the exemption from economic regulation provided by Section 203(b)(5) of the Interstate Commerce Act."

Section 203(b)(5) of the Interstate Commerce Act (49 U.S.C.A. 303(b)(5)) has been in its present amended form since December 17, 1963. Yet, Mr. Caputo, whose duties and responsibilities are the efficient and economical distribution activities of the DOD was not aware of this section until someone called it to his attention in the latter part of 1966. One must wonder what other services and carriers are available to the DOD that Mr. Caputo knows nothing of.

This is an application that is to be determined on the basis of an "urgent and immediate need." There can be no showing of any need unless the existing services have been found wanting, and here the supporting shipper does not even know who the existing carriers are. It is well established that the duty to locate existing carriers is on the supporting shipper. In *Warren Transport Inc. Common Carrier Application* 69 M.C.C. 241, Division 1 stated as follows:

> "Applicant argues that the failure of carriers to seek out the shippers and offer their services indicates their indifference and lack of interest in the shippers' traffic. We do not agree. We have consistently stated that it is the duty of shippers to *inform themselves* of existing service, before seeking additional motor-carrier authorization."

On page 2 of Mr. Caputo's statement he says that his statement is submitted in response to the Order served November 5, 1968, wherein this statement appears:

> ". . . . for the purpose of receiving a verified statement from the Department of Defense which shall, to the extent the national defense and security permit disclosure, specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers."

The DOD statement falls woefully short of meeting the requirements of the Order of November 5, 1968. Nothing in this statement can be construed as evidence of "service which cannot be met by existing carriers." Nowhere in this statement do we find any specific references to the inability of carriers to provide service. Granted that national defense and security must be safeguarded, however, there would be no detrimental effect on national defense if the DOD had specifically named the carriers who failed to provide the needed service, the dates such instances occurred and the injury the DOD sustained thereby.

Look at some of Mr. Caputo's examples:

On page 7, paragraph "1" we find a lengthy discourse on "time in transit" comparing joint line and single line service. The comparison is interesting; however, it is not supported with any concrete facts. This is no more than Mr. Caputo's opinion, which is not based on any foundation as to either his qualifications to render this opinion, or any specific facts as to carriers, numbers of carriers, dates, origins and destinations. This paragraph is meaningless.

It is interesting to note that he talks about a "majority" and a "substantial part" of the certificated carriers available to him provide joint line service. Which, of course, means that there are carriers available to him that pres-

ently provide the single line service he claims he needs. This is what the protestants also claim.

Paragraph "2" on page 7 refers to "virtually all" carriers available to him are regular route carriers. We still must conclude from his statement that there are some irregular route carriers available to him. Again, since he fails to specifically state names, dates, origins and destinations, and commodities, there is no way to conclude that he needs one more irregular route carrier, These facts are known to him, or should be, if he is discharging his duties and responsibilities as Director of Transportation for the DOD.

Note paragraph "3" on page 8 where Mr. Caputo now refers to "some" carriers using single drivers rather than two-man teams. How many are "some"? Mr. Caputo goes on to say that he "understands" that "some" of these carriers do not qualify or license their power units in all states through which they operate. This statement then prompts these questions:

What is the basis for his understanding?

What do you mean by "some"?

How many?

Who are they?

Further, in this same paragraph it is stated that "sometimes" this situation results in delays. Again, there is nothing specific. If this actually has happened they know about it or should have known.

The statement also refers to the "myriad of other inevitable snags" that "seem" to occur. What are they? Do they really occur or only "seem" to?

This entire paragraph is totally unworthy of the slightest consideration in an application where the prime consideration is "urgent and immediate need which cannot be met by existing carriers." The proof must consist of specific facts that would allow the Commission to make a deter-

mination. To this point this statement has not met the requisite burden of proof.

The DOD now sets forth what they categorize as "clearly disclosed" examples:

Paragraph "1" on page 9 of this statement refers to differences in transit time between joint line and single line service. They remain consistent in that they neglect to support this statement with any facts. This is an unsupported self-serving conclusion. This isn't factual evidence.

Paragraph "2" on page 9 again fails to specifically state who provided the transportation; when it was transported; what the shipping instructions were; what routes were travelled; and what the shipping requirements were.

Paragraph "3" on page 9 refers to the "only known" certificated carrier service available for this movement. Since the carrier is not named, how do we know who the DOD is referring to? Is this the "only known" carrier to them? Again, the only conclusion that can be drawn is that the DOD doesn't know.

The DOD then goes on to refer to "some" instances, while in "other" instances certain types of service are available. There isn't a single specific factual instance recited to support this general conclusion drawn by Mr. Caputo of the DOD.

The three "examples" supposedly cited by Mr. Caputo as being "clearly disclosed" are in fact nothing more than general self-serving conclusions which are wholly inadmissible as evidence of either "urgent and immediate need," on service that cannot be met by existing carriers.

Mr. Caputo continues to generalize the services of the existing carriers with such statements as:

> "... inherently inefficient" and "inefficient because it does not permit the provision of transportation

service that is fully possible and practical under proven techniques." (last paragraph on page 10 of Mr. Caputo's statement).

Rather than spell out the inefficiences or or what is possible or practical under proven techniques with factual and specific instances, Mr. Caputo merely complains that DOD has been forced to "live with" this situation.

If the situation is as Mr. Caputo concludes that it is, one wonders why he did not seek out the applicant before the applicant came to him, and why the DOD has not made any effort to support any of the existing carriers, or any other carriers, for this authority. How long has this situation been going on? If this "urgent and immediate" need did not exist before the applicant arrived on the scene (if it had the DOD surely would have made some attempt to satisfy their need—which it did not do.) then the "urgent and immediate" need does not exist today.

These are not the hopes, desires, or conclusions drawn by the protestants, these are the only conclusions that can be drawn by reading and digesting the purported supporting statement of the DOD.

In further examination of this statement we find on the bottom of page 11 (the last sentence) that to Mr. Caputo's knowledge no carrier holds authority to provide single line service from many of the origin points to the destination points. On pages 12 through 14 he cites examples where this "deplorable situation" exists. Yet, nowhere in this "supporting" statement do we find any evidence that traffic actually moves from these origin points to these destinations. Nowhere is there any evidence that any carrier was ever called upon to move any traffic between these points. Nowhere is there any basis for Mr. Caputo to categorize joint line service generally as a "deplorable situation." This conclusion, if it actually exists, is one

to be drawn by the Commission from the evidence presented to it. Mr. Caputo's generalizations are not entitled to any weight as evidence.

On page 15 the statement now talks about Mr. Caputo's responsibilities to conduct DOD's functions in an efficient and economical manner. This responsibility has been "effectively subverted" since he has to depend upon motor carrier service that is presently available to him. This is the same argument that has been used throughout his statement. The only difference here is the use of another hackneyed expression. This added twist to the same argument still fails to be supported by any specific facts. The DOD appears to be at odds with the National Transportation Policy since all existing carriers have obtained their certified authority under that Policy which specifically fosters sound economic and efficient transportation for the shipping public. If the Commission accepts the DOD's statement as a *credena,* then the entire National Transportation Policy must be held for naught.

Since the DOD refuses to disclose what the specific facts are regarding the "times in transit", it is impossible to accept their conclusion that they are "unduly excessive" and therefore result in higher costs to the taxpayers. (page 15 of the supporting statement)

In the second paragraph on page 15 we find that the DOD is supporting the applicant to assure that the Government's reasonable transportation requirements are met. So far, all we know about the Government's transportation requirements is that they have transported a certain quantity of commodities between points. We have not learned from this statement the volume of traffic between any specific points. We have not learned of any requirements of time on specific shipments between specific points other than that the DOD wants the traffic moved within certain time limits. We cannot conclude from the facts presented that the service already available is anything but reasonable.

Mr. Caputo also tells us in his statement that the available service is reasonable since they support the applicant to "assure" that the Government's reasonable transportation requirements are met. The word "assure" means: to make safe; to give confidence to. It is obvious, therefore, that the DOD is already receiving reasonable service and that they feel that another carrier will mean that the reasonable service will continue. We must conclude, however, that since they are already getting reasonable service that another carrier is not needed.

> "The shippers expressed desire for a stand-by service to provide for possible inability of the carrier ordinarily utilized is not a proper basis for a grant of additional authority in absence of evidence demonstrating a genuine need for more than one service." (*C & H Transportation Co. Inc.—Extension Silos* 98 M.C.C. 285)

Turning now to page 18 of the statement we find reference to "service failures" that require additional motor carrier service be made available for movement of DOD traffic. This "concrete example" merely makes a generalization that there was failure on the part of carrier to make a promised three-day transit time. No mention is made of when this took place, who the carrier was, or anything specific about the shipment. If this took place during the time that the applicant was providing services for the DOD, it might have been performed by the applicant.

On page 18 of the statement, in the first full paragraph, Mr. Caputo states that he has demonstrated that the currently certificated carriers services do not meet the DOD's requirements. The obvious conclusion remains the same, that is, you can only demonstrate inadequacies by factual evidence. This has not been done, therefore, merely rehashing the same tired argument over and over again does not take the place of evidence.

Mr. Caputo now enters into a discourse on the service provided by the applicant, on pages 20 and 21 of his statement. The protestants will concede that probably the services of the applicant were satisfactory. The protestants strongly deny, however, that this provides any evidence that the existing services were inadequate. In paragraph "1" on page 20, the statement is made that no certificated carrier could provide the service the applicant performed. How does the DOD reach this conclusion? Who did they call? Why wasn't it specified what efforts were made to obtain the services of regulated carriers? This is one more, of many, unfounded assumptions and conclusions.

In paragraph "2" he talks about his experience with regulated carriers. Nothing in this entire statement shows that he had any experience, of any kind, with regulated carriers. It is not a violation of national defense to name the carrier who failed to provide a service. Yet, when it comes to facts, Mr. Caputo prefers to remain silent.

In paragraphs "3", "4", and "5" he reports the same story that certificated carriers could not meet the requirements. The specific facts are again omitted.

In considering the entire statement of the DOD, it is impossible to find anything that would lead anyone to believe that the existing carrier services cannot satisfy this shipper's needs. There are many conclusions to that effect, but not one shred of evidence to support those conclusions. It is clear, therefore, that the existing carriers can meet the needs of the shipper.

Next we turn to the question of whether or not there is an "urgent and immediate need." The DOD statement tells us about the various pounds of traffic they must transport from various points. A claim is made that the DOD required service to transport 1,900,000 pounds of freight between August of 1967, and June of 1968. This is a siz-

able amount of traffic, however, as far as establishing an "urgent and immediate need" is concerned, there must be some evidence to the fact that this represents an unusual increase in traffic over a similar period in the past. At least we should have some comparison regarding the amount of the traffic and the number of carriers available to the DOD over a certain period of time so that we can draw some conclusion regarding this shipper's need. Unfortunately no such evidence is furnished.

On page 6 of Mr. Caputo's statement he says that the traffic (tremendous volume), in part, must be moved in the most expeditious manner possible. What he neglects to say is what part of this traffic must be so moved, and from where to where. There isn't even the slightest reference as to either of these important elements nor is there any showing as to why this becomes necessary, if it does.

On page 16 of his statement, Mr. Caputo says that certain incoming shipments are fed directly into the production line from the delivery vehicle. This statement was apparently designed in attempt to show that expeditious service is needed. Overlook, for the moment, that there is no showing that the existing carriers failed to perform this service, but look at Mr. Caputo's duties and responsibilities. He is the Director for Transportation and Warehousing Policy. His duty is to maintain an efficient and economical operation for physical distribution activities of the DOD. One wonders why, if the service of the existing carriers has created the "deplorable situation," that Mr. Caputo says it has, feeding a production line from the delivery vehicle is the most efficient and economical manner possible. There is such an inconsistency here, and throughout the entire statement, that it is impossible to form any intelligent conclusion.

Mr. Caputo is moved by his feelings, rather than by facts, in drawing his conclusions. On page 15 of his state-

ment he *feels* that the quantity of freight is so vast that another carrier is needed. This point is not worthy of a response since the Commission is not influenced by a supporting shipper's feelings. The Commission relies on factual evidence in making their findings.

Along the same line Mr. Caputo, on page 19, wants the Commission to find that an "urgent and immediate need" exists because Mr. Caputo *feels* that the applicant's service is superior to some carriers he has used. No mention, again, is made to any specific carrier. Is this evidence of need? Certainly not.

DOD is supporting this application for authority to perform transportation services that the DOD was utilizing prior to the time that the United States District Court for the Western District of Oklahoma, (*Munitions Carriers Conference Inc., et al.* v. *American Farm Lines,* Civil No. 67-487) found said services to be illegal. Was the most efficient and economic manner of transportation, illegal transportation? Is it impossible for the DOD to function by using legal, certificated carriers?

Further, the DOD, in their statement, tells us that the service of the applicant will be used to complement, rather than replace, the service available from other carriers. (See page 19 of the Statement). If this is true, where is the need for the applicant? On page 22 of the statement we find that it is Mr. Caputo's opinion that a grant of authority to the applicant would have no adverse affect on the existing carriers . In about a year and one half the applicant transported 74,155,685 pounds of freight for the DOD (page 19 of the Statement) that legally should have been tendered to a certificated carrier. Can anyone say that the loss of this much traffic in this period of time could be considered as anything other than an "adverse affect?"

In summing up the statement of the DOD in support of the application herein, we find that it is replete with opin-

ions, feelings, and illogical and wholly unsupported conclusions. It does not sustain the burden of showing:

> "an urgent and immediate need for services which cannot be met by existing carriers."

It is worthy of a note that the granting of the authority applied for by the applicant herein would create a situation that is inconsistent with the public interest and the National Transportation Policy. The granting of this authority would put the applicant in the position of wearing three hats at the same time, for example:

1. The applicant would be a common carrier subject to all the rules and regulations of the Interstate Commerce Commission including maintaining a uniform system of accounts, records, filing of required reports, rates, tariffs, etc.

2. The applicant would be a cooperative association exempted from the operation of law under 49 U.S.C.A. 303(b)(5).

3. The applicant would be entitled to perform transportation services for nonmembers, for hire, not to exceed 15% of its total interstate tonnage.

The problem that immediately appears at the surface is what hat, at any given time, will the applicant be wearing?

We find in Section 210 of the Interstate Commerce Act (49 U.S.C.A. 310) a prohibition against any person from holding both a permit as a contract carrier and a certificate as a common carrier for the transportation of property by motor vehicle over the same route or within the same territory unless, for good cause shown, the Commission shall find that both a certificate and a permit may be so held consistently with the public interest and the National Transportation Policy.

The Commission has stated that this prohibition is in recognition of the opportunity for discriminatory practices which are present when a carrier is authorized to offer both kinds of service to shippers. Such discrimination would include the ability of the shipper to obtain special treatment on his contract carrier traffic by assuring the dual carrier of certain traffic for transportation in common carrier service; the ability of the dual carrier to obtain an undue advantage over competing common carriers by giving the shipper special treatment in contract operations; and ability of the dual carrier to accomplish what amounts to a rebate of part of its common carrier charges by agreeing to contract charges lower than it would otherwise accept. See *Yale Transportation Corp.* v. *United States,* 185 F. Supp. 96.

Contrast the above with the situation the instant application presents. In the instant application we would not have a dual carrier, we would have a threefold carrier. The discriminatory practices hereinbefore cited would not only be a possibility but they would be propagated. It is conceivable that any transportation service performed could include a partial common carrier shipment, a partial exempt commodity member shipment, and a partial nonmember (15%) shipment. Would the Commission be able to adequately regulate this carrier? We think not.

III

Conclusion

In this response, an effort has been made to follow the Order of Division 1, acting as an Appellate Division, served November 5, 1968. This response being so made is not intended to admit the proper issuance of said Order, rather the protestants steadfastly hold that this Order is served without the sanction of general rules of practice and procedure of the Interstate Commerce Commission.

The Order, however, did state, as its purpose, the receipt of a verified statement from the DOD specifying the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers.

The response of this protestant shows that the statement of the DOD has failed to sustain its burden of establishing through factual evidence that there exists an immediate and urgent need for the applicant's services. No showing was made that the existing carriers could not provide the services needed.

The eleven essential elements of a supporting shipper's statement are set forth in the special rules of practice for filing applications for temporary authority (49 C.F.R. 1131.2(c)). The supporting statement of the DOD does not meet these minimum requirements in spite of the fact that the language of that section is quite clear:

> "Any such supporting statement must contain at least the following information."
>
> (The eleven elements are then listed)

The only exemption that the DOD can take advantage of in this section is that when they are the shipper their support may be furnished directly to the Temporary Authorities Board by the Washington office of that department, and that it need not contain a certification of its accuracy or be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. They are not exempt from providing the elements essential to a supporting statement. Having failed to submit "at least" the information specified in 49 C.F.R. 1131.2(c) they have failed to establish that a bona fide need, in fact, exists.

It has also been shown that a grant of authority in this cause would not be consistent with public interest and the

National Transportation Policy, and should be denied for that reason alone.

WHEREFORE, protestants, National Motor Freight Traffic Association, Regular Common Carrier Conference, and Common Carrier Conference—Irregular Route pray that the instant application be denied in its entirety.

Respectfully submitted,

BRYCE REA, JR.
DONALD E. CROSS
1329 E Street, N.W.
Washington, D. C. 20004
Counsel for National Motor Freight Traffic Association Inc., Regular Common Carrier Conference, and Common Carrier Conference—Irregular Route

Of Counsel:

REA, CROSS & KNEBEL
917 Munsey Building
1329 E Street, N.W.
Washington, D. C. 20004

DATED: December 9, 1968

DUE DATE: December 13, 1968

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. MC-129908 TA

AMERICAN FARM LINES

Reply of North American Van Lines, Inc. to the Verified Statement of Vincent F. Caputo

Comes Now Protestant North American Van Lines, Inc. (North American), a carrier certificated in MC-107012 to transport *household goods,* as defined by the Commission, between points in the United States, and files this reply to the verified statement of Vincent F. Caputo.

Applicant seeks temporary authority to transport general commodities without exception. North American urges that if any authority is granted herein that it contain the usual restriction against the transportation of *household goods,* as defined by the Commission.

Mr. Caputo's statement makes reference to a wide range of commodities (pages 5-6). Nowhere in the statement, however, does he mention the transportation of household goods. Neither is there any indication in Applicant's presentation that it has ever transported that commodity for the Department of Defense. Lacking such specific evidence the application should be denied at least to that extent.

There are several dozen carriers available to the Department of Defense to transport household goods on a single-line basis between the points named in this application. For example, North American operates a specialized fleet of 2,579 tractors, 2,714 trailers, and 1,025 straight trucks. It has 318 agents in the involved states. It regularly moves household goods for the Department of Defense; and during the month of April alone transported 132 government shipments with a combined weight of 438,188 lbs. between the points embraced by this application.[1]

[1] For more detailed evidence of North American's services refer to its protest dated June 3, 1968.

Applicant has never moved household goods for the DOD, nor does that agency express any need for Applicant's service. Nevertheless, a grant of temporary authority would permit Applicant to begin diverting traffic from existing carriers under the military's household goods traffic rotation system. Loss of that traffic to North American and other certificated household goods carriers would cause substantial economic harm . In view of the existing and adequate service, that result should not be permitted.[2]

Wherefore, North American prays that the application be denied; or in the alternative, that it be restricted against the transportation of *household goods,* as defined by the Commission.

Respectfully submitted,

NORTH AMERICAN VAN LINES, INC.

By:

MARTIN A. WEISSERT
Its Attorney
P. O. Box 988
Fort Wayne, Indiana 46801

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[2] In Applicant's corresponding permanent application it specifically excludes *household goods,* as defined by the Commission. This is an obvious admission that it is not interested in nor is there any need for its service with respect to that commodity. Any temporary authority granted in this proceeding should therefore embrace no more commodities than requested by the permanent authority application.

BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET NO. MC-129908 TA

IN THE MATTER OF:

THE APPLICATION OF AMERICAN FARM LINES

Response of Red Ball Motor Freight, Inc., To Verified Statement of Vincent F. Caputo

Comes now RED BALL MOTOR FREIGHT, INC., hereinafter referred to as Red Ball, a protestant in the above proceeding, and files this, its response to the Verified Statement of Vincent F. Caputo dated November 20, 1968.

I.

STATEMENT OF THE CASE

By application filed May 17, 1968, and published in the *Federal Register* of June 8, 1968, at page 8523, American Farm Lines, hereinafter referred to as AFL, seeks authority to operate as a common carrier by motor vehicle, over irregular routes, transporting the following:

> *General commodities including classes A and B explosives,* restricted to traffic moving on Government Bills of Lading
>
> Between points in Arkansas, Illinois, Indiana, Kansas, Kentucky, Louisiana, Missouri, Oklahoma and Texas, on the one hand, and, on the other, points in Arizona, California, Nevada, Utah and Washington.

Red Ball filed a timely protest to the granting of the temporary authority application, and, by order of the Temporary Authorities Board served July 15, 1968, the application was denied. After the filing of applicant's Petition for Reconsideration and a timely reply to such petition by Red Ball, Division 1, acting as an Appellate Division,

by Order served September 5, 1968, vacated and set aside the order of the Temporary Authorities Board of July 12, 1968, and granted the application for temporary authority for a 90-day period. By order dated November 5, 1968, the Commission, Division 1, acting as an Appellate Division, reopened the proceeding on its own motion for the submission of a verified statement by applicant and any response which might be filed by protestants. This statement is submitted as a response as provided in that Order.

II.

Reaffirmation of the Position of Protestant Red Ball Motor Freight, Inc.

Protestant Red Ball reaffirmed its interest in said application and its position stated in previously filed pleadings herein, including the facts and circumstances set out in its original protest dated June 19, 1968, which is already part of the record herein. The entire operating authority of Red Ball Motor Freight, Inc., is set out in Southwestern Motor Freight Bureau, Inc., Tariff 12-0, MF-ICC 437.

III.

Verified Statement of Vincent F. Caputo Is Not in Compliance With the Commission Rules Pertaining to Temporary Authority

The I.C.C. Rules and Regulations, 49 CFR Sec. 1131.2 (*Filing of Applications for Temporary Authority*) concerning supporting statements enumerate 11 specific items which must be contained in *any* supporting statement. The supporting statement to which this reply is directed has failed to comply with these mandatory requirements. No attempt whatsoever was made to answer 49 CFR Sec. 1131.2 (c), (3) and (8) which require information concerning the past transportation of the traffic involved and the efforts which have been made to obtain service from existing

motor, rail or water carriers, and the dates and results of such efforts.

IV.

The Verified Statement of Vincent F. Caputo Will Not Support the Required Findings for a Grant of Temporary Authority

The above-mentioned statement is so vague and written in such general terms that it cannot support a finding "that there is an immediate and urgent need for the motor carrier service here involved, and that there is no motor carrier service capable of meeting such need". However, throughout the entire statement, the presence of existing service is clearly shown. At page 9, Mr. Caputo makes this statement:

> "... the one carrier now holding a certificate authorizing it to provide a single-line service for movement of such shipments on an irregular route basis consistently effects 'third morning delivery at Bangor, Washington."

At page 9:

> "... delivery is made within 72 hours after dispatch of the shipment from San Jose, Calif., when service is provided on a single-line basis by *carriers* using 2-man driving teams." (Emphasis supplied.)

At page 10:

> "In some instances service is available from (regular route carriers) on a single line basis, while in other instances the only service available is that on a 'joint-line' basis."

Further, the volume figures given at pages 5 and 9 of Mr. Caputo's statement show the extensive service presently available. When converted to a similar basis at 1½ years'

coverage, a simple computation will show that of a total of some 3,109,090,908 (172,727,272 lb./month) transported during the period 12/66 to 6/30/68, American Farm Lines transported 74,155,685 pounds or approximately only 2.4% of the traffic involved, while, on the other hand, existing common carrier service transported approximately 97.6% of the involved traffic or some 3,034,935,223 pounds of freight in the same period. Nothing can more emphatically illustrate the existence of vast amounts of common carrier service presently available to the supporting shipper herein than his own statement showing transportation by present carriers of in excess of *3 billion* pounds of freight. Certainly, the finding that there is no motor carrier service available capable of meeting the needs of the supporting shipper herein cannot be found in the face of these figures, and without such a finding, there is no basis for Section 210a(a) temporary authority.

V.

Desire for Single-Line Service Will Not Justify the Issuance of Temporary Authority

The Interstate Commerce Commission's Rules at 49 CFR Sec. 1131.4(4) specifically provide that the desire for single-line service will not justify the issuance of temporary authority unless it is clearly established that existing carriers are unable to provide service which meets the reasonably immediate and urgent need of the supporting shipper. It is apparent from the statement of Mr. Caputo that this temporary authority application is one seeking to inject one more common carrier into an area where a plethora of common carrier service, both direct and interline, is presently available to the Department of Defense. Certainly this is no basis for the grant of temporary authority.

Applicant herein has not established the legal prerequisites for temporary authority under Section 210a(a) of the Interstate Commerce Act, as amended, 49 USC 310a(a),

(1) that there exists an immediate and urgent need for any of the proposed service, and (2) that there is no carrier service capable of meeting such a need.

Therefore, protestant urges that upon reconsideration, this application should be denied.

Respectfully submitted,

RED BALL MOTOR FREIGHT, INC.

CHARLES D. MATHEWS
President and General Counsel
P. O. Box 47 407
Dallas, Texas 75247

December 10, 1968

BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET No. MC-129908 TA

IN THE MATTER OF:
AMERICAN FARM LINES

Verified Statement of Fred S. Anderson

My name is Fred S. Anderson. I reside at 3215 53rd Street, Lubbock, Texas, and I am employed by T.I.M.E. Freight, Inc. as Senior Vice President—Operations. I have been with T.I.M.E. Freight, Inc. (TIME), or its immediate predecessor, for the past 34 years. I am in complete charge of and familiar with all of the operations of the company, including long line, as well as terminal, operations.

I am familiar with the application of American Farm Lines, Docket No. MC 129908 TA, the various pleadings in the case and the various Orders as issued by the Interstate Commerce Commission. I am also familiar with the Commission's Rules and Regulations as to the grants of Temporary Authority, as well as the supporting statements

which must accompany applications submitted to the Commission for Temporary Authority.

The Commission, Division 1, by Order dated November 5, 1968, acting as an Appellate Division, reopened the record for receipt of verified statements on behalf of both the applicant and protestants. December 6, 1968 was set as the date by which protestants may submit verified statements in response to any statement submitted by the applicant. Subsequently, the Commission extended such date to December 13, 1968.

Further, the Order states that the Commission, on reconsideration, will consider the application on the record made, together with such verified statements as may be filed.

TIME, as a protestant in this proceeding, has previously filed its Certificate of Public Convenience and Necessity as issued by the Interstate Commerce Commission in Docket No. MC 35320.

I have read the statement of Vincent F. Caputo submitted on behalf of the Department of Defense in support of the grant of Temporary Authority.

TIME holds authority over regular, as well as irregular routes; its authority is not fragmented. Portions of its irregular authority are found in MC 35320, Sub 77, which reads as follows as found on Sheet 3 under irregular routes:

> General Commodities (With the Usual Exceptions), however, with the authority to transport Class A & B Explosives:
>
> "Between all establishments, installations or premises in California which are actually then in use by the United States Department of Defense, Army, Navy or Air Force, on the one hand, and, on the other, points in California."

TIME holds regular route authority as found in its master certificate in Sub 69 to transport General Commodities (with the usual exceptions), however, with the authority to transport Class A and B Explosives, between Memphis, Tennessee, Little Rock, Arkansas, Tulsa, Oklahoma, Oklahoma City, Oklahoma, Springfield, Missouri, Kansas City, Missouri, St. Louis, Missouri, on the one hand, and, on the other, Los Angeles, California, over regular routes.

As Senior Vice President—Operations, it is my duty to obtain from the Commission alternate authority over the shortest routes possible or practical between all points authorized to be served by the company. It is my belief that TIME has the shortest and fastest routes practical between its points.

The company uses two-man teams on many of its runs. We have spent thousands of dollars in training our personnel to handle expeditiously Classes A & B Explosives, as well as all Government traffic. We maintain spare trailers and spare over-the-road equipment in all of our locations to handle fluctuations in business. When we receive an order for a pickup, we, therefore, have spare trailers and tractors available to make such pickups and do not have to run from hundreds of miles away in order to properly service our accounts. The company owns and operates 490 line-haul tractors and in excess of 1,500 line trailers, all of which, except for a slight minority, are suitable for the needs of the supporting shipper.

We have explosive authority between St. Louis, Missouri, Springfield, Missouri, Joplin, Missouri, Lawton, Oklahoma (Ft. Sill, Oklahoma), Miami, Oklahoma and Tulsa, Oklahoma, on the one hand, and Los Angeles, California on the other. In addition, we hold General Commodity authority (with the usual exceptions), however, not including A & B, between Alton, Illinois, East Alton, Illinois, Granite City, Illinois, Ft. Worth, Texas, Garland, Texas, Carrollton,

Texas, on the one hand, and Los Angeles, California, on the other.

As previously stated, we hold irregular route authority to transport General Commodities between all military installations, on the one hand, and, on the other, points in California.

In addition, as found in our master, certificate, we hold authority between Yuma, Litchfield Park, Phoenix, Goodyear, Tucson and Glendale, Arizona, on the one hand, and, points in Missouri, Oklahoma, Arkansas and Tennessee, as previously set forth.

It is noted that the verified statement of Vincent F. Caputo does not set forth a breakdown as to the number of pounds transported for the Department of Defense as to what part moved by rail, motor carrier, or air.

It is noted that the Department of Defense admits that it is presently obtaining third-morning delivery by a certificated carrier transporting Classes A & B explosives moving from McAlester, Oklahoma to Bangor, Washington. It further admits that it is obtaining 72-hour service on empty shell cases from San Jose, California, to Doyline, Louisiana (Page 9, Verified Statement of Vincent F. Caputo).

The Department of Defense (Page 11, Verified Statement of Vincent F. Caputo) states that it is unable to find a single carrier that is authorized to provide service on a single-line basis from many of the Midwest, Southern and Southwestern states involved here to all points in the State of California. As previously pointed out, TIME has a great deal of coverage in the Midwest, Southern and Southwestern states direct to all points in California.

TIME serves McAlester, Oklahoma, via a connecting line from McAlester to Tulsa to all points in California and many points in Arizona. The equipment is furnished by TIME to such carriers as Express Carrier and Rocket. It

is my experience that these connecting carriers tender TIME the trailer on the same date as the lading is picked up at the Naval Ammunition Depot at McAlester, Oklahoma.

On Page 12, Verified Statement of Vincent F. Caputo, it is stated that the Department of Defense does not know of any carrier authorized to transport DOD traffic in single-line service from Rogers, Arkansas, to *any* point in California. TIME holds authority to transport DOD traffic in single-line service from Rogers, Arkansas, to *all* DOD points in California.

On Page 13 it is stated that the DOD know of no carriers authorized to provide single-line service for movements of DOD traffic from Sacramento Army Depot, Sacramento, California, to Ft. Sill, Oklahoma. TIME has authority to perform such single-line service.

On Page 14 it is stated that there is no known carrier authorized to provide single-line service for movements of DOD traffic from Twenty-Nine Palms, California, to Ft. Sill, Oklahoma, or to Fort Leonard Wood, Missouri. TIME has authority to perform the foregoing on a single-line service. Such authority to serve Ft. Sill, Oklahoma, which is in the Commercial Zone of Lawton, is found in the master portion of MC 35320, Route 23. Its authority to serve Fort Leonard Wood, Missouri, is found in Sub 69 of its certificate.

On Page 14 it is further stated that the DOD knows of no carrier authorized to provide single-line service for movements of DOD traffic from Tracy Defense Depot, Loyth, California, to Oklahoma City, Oklahoma. TIME holds such authority.

Applicant's supporting statement refers to use of the Department of Defense of American Farm Lines for various movements, however, it does not state that it cannot presently use the services of American Farm Lines now

or after January 1, 1969 as a farm coop without the necessity of an issuance of a certificate by the Commission.

As previously stated, I am familiar with the Rules and Regulations of the Commission as to grants of Temporary Authority. The Rules and Regulations of the Commission, Section 1131.2 (c) state in part:

> "Any such supporting statement must contain at least the following information:
>
> " . . .
>
> "(8) Whether efforts have been made to obtain the service from existing motor, rail or water carriers, and the dates and results of such efforts.
>
> "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

I am unable to find in any of the applicant's supporting statements the efforts that have been made to obtain the service from existing carriers and the dates and results of such efforts, nor the names and addresses of existing carriers who have either failed or refused to provide service, nor the reasons given for any such failure or refusal.

In the territory in which protestants operate, I believe the protestants can meet the reasonable requirements of the supporting shipper. TIME has not received any serious complaints from the Department of Transportation nor has it failed or refused to provide adequate transportation to meet the Department's when needs called upon. We regularly solicit traffic from DOD and this traffic amounts to approximately 14% of our total revenue.

FRED S. ANDERSON
Fred S. Anderson,
Senior Vice President—Operations

VERIFICATION

STATE OF TEXAS
COUNTY OF LUBBOCK

Fred S. Anderson, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

FRED S. ANDERSON
Fred S. Anderson

SWORN TO AND SUBSCRIBED BEFORE ME, a Notary Public in and for Lubbock County, Texas, this the 11th day of December, 1968.

MARY MILLS
Notary Public,
Lubbock County, Texas

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-129908 TA

In the Matter of the Application:

AMERICAN FARM LINES
TEMPORARY AUTHORITY APPLICATION

Verified Statement of Jerome Biniasz of Transcon Lines

My name is Jerome Biniasz and my business address is 1206 South Maple Avenue, Los Angeles, California. I am employed by Transcon Lines in the capacity of Chief, Commerce, which position I have held since July, 1966. Prior to that date, I was employed by Kramer-Consolidated Freight Lines, Inc. as Assistant Director of Traffic and I had been with Kramer-Consolidated Freight Lines, Inc. since 1956. During the time I was connected with Kramer-Consolidated Freight Lines, Inc., I participated in various activities of the Company, including traffic, operations,

sales, and the handling of matters before the Interstate Commerce Commission and the various state regulatory agencies. Kramer-Consolidated Freight Lines, Inc. was purchased by Transcon Lines as of July 1, 1966, and I was immediately employed by Transcon Lines after the consummation of its purchase of Kramer-Consolidated Freight Lines, Inc. My duties with Transcon Lines have been essentially the same as those in which I participated when I was employed by Kramer-Consolidated Freight Lines, Inc.

As a part of my duties with Transcon Lines, I am familiar with the financial affairs of that Company and financial statements come to me each accounting period. My immediate supervisor is the Senior Vice President, Finance. I have become familiar with the operations of Transcon Lines, with the General Office of Transcon Lines and with the operations of the Company and facilities encompassed within these applications.

Transcon Lines, hereinafter referred to as Transcon or protestant, is a certificated motor common carrier operating under and by virtue of Certificate of Public Convenience and Necessity No. MC-110325 and subs thereunder. This certificate authorizes the transportation of general commodities, with the usual exceptions, between points, among others, in California and Arizona on the one hand, and on the other, points in Indiana, Illinois, Missouri, Arkansas, Texas, Oklahoma and Kansas in direct single-line service over regular routes.

I have read the statement submitted by Vincent F. Caputo and, in response to the points listed on Pages 3 and 4 of that statement, submit that Transcon has authority to serve the following points as either origins or destinations: St. Louis, Missouri; McAlester, El Reno, Oklahoma City and Tulsa, Oklahoma; Pine Bluff, Arkansas; Indianapolis, Indiana; Alton, East Alton and Granite City, Illinois; Fort Worth, Dallas, Garland and Carrollton, Texas; Atchison, Parsons and Wichita, Kansas; Los Angeles, Oakland, El

Segundo, La Mirada, San Jose, Santa Clara, Vernon, El Monte, Culver City, Seal Beach, Burbank and Long Beach, California; Phoenix, Tuscon and Glendale, Arizona. Protestant is able to serve numerous points throughout the midwestern, southern and southwestern states.

Protestant maintains full staffed terminals in the following locations, which are within the scope of authority being sought by American Farm Lines in MC-129908-TA: San Francisco and Los Angeles, California; Phoenix and Tucson, Arizona; Indianapolis, Indiana; Chicago, Danville and Springfield, Illinois; Kansas City and St. Louis, Missouri; Little Rock, Arkansas; Amarillo, Dallas and Houston, Texas; Oklahoma City, Ponca City and Tulsa, Oklahoma; and Wichita, Kansas.

Transcon operates approximately 713 tractors and in excess of 1,900 trailers, all of which equipment is designed and constructed for the purpose of transporting the type of commodities involved in the instant application. In addition to the over-the-road equipment, Transcon operates 350 Pickup and Delivery Tractors, 512 Pickup and Delivery Trucks, and 113 Pickup and Delivery Trailers. A considerable amount of the equipment is stationed at the terminals listed above. Additionally, each of the terminals has a number of the Line-Haul trailers in a pool for the picking up of volume or truckload shipments.

Contrary to the statements of Mr. Caputo, Transcon Lines, a regular route common carrier, does operate "two-man driving teams" on all traffic between points in California and Arizona on the one hand, and on the other, points in Indiana, Illinois, Missouri, Arkansas, Texas, Oklahoma and Kansas. All of the equipment utilized to transport such shipments is "qualified" or "licensed" in all the states involved so that no delay is encountered to await properly "qualified" or "licensed" equipment, as we are given to believe in Mr. Caputo's statement.

Mr. Caputo's statements on Pages 12, 13 and 14 are erroneous in that Transcon does possess the necessary authority to transport general commodities between Pine Bluff, Arkansas, and points in California and Arizona. Likewise, Transcon Lines does possess authority from Parsons, Kansas, to points in California and Arizona. Additionally, protestant possesses authority from San Jose or Santa Clara, California, to Pine Bluff, Arkansas, and from Vernon, California, to Pine Bluff, Arkansas. Thus, in each of the instances shown above, Mr. Caputo's information is incorrect and fails to advise if such movements actually have moved within any definitive period of time or are singly possible moves.

On Page 10 of Mr. Caputo's statement, we are told that the irregular route carriers are capable of performing service at approximately one-half the transit time of the regular route carriers. Transcon submits that the statement is an impossibility and with complete disregard to the safety of the general public over any possible combination of routes which the carrier may operate. Transcon Lines offers to the general public third-morning delivery between the Los Angeles, California area, and St. Louis, Missouri. To say the irregular route carriers are capable of performing the same service in approximately one and one-half days is humanly impossible. The short line mileage between St. Louis, Missouri, and Los Angeles, California, is 1,841 miles which if driven in thirty-six (36) hours, would require an average speed of 51.1 miles per hour. To attain the average speed and maintain it may only be done with complete disregard for the safety of other vehicles traveling over the same route. This statement appears to contradict the statement on Page 7 in paragraph numbered one (1) wherein Mr. Caputo states that, "... by use of 'two-man' driving teams generally can be relied upon to consistently provide delivery within a transit time computed by allowing eight (8) hours for each 300 'short line' miles involved." Using this as a standard, the shipments between St. Louis

and Los Angeles would require approximately fifty-one (51) hours or fifteen (15) hours over and above that which we are led to believe occurs by conducting operations over irregular routes between the same two points.

It is submitted that Mr. Caputo's statement is deficient in that although tonnage figures are shown, it is also indicated that this tonnage moved by rail or motor vehicle and by aircraft without designating which mode was predominant or the percentage of traffic carried by each mode. It is only with this information and the tonnage handled by applicant for the same period that it can be shown that the tonnage being diverted to applicant is substantial, rather than minuscule, as we are led to believe.

The inconsistency of using different periods to show service requirements and that of the applicant is further distorted on Pages 20 and 21 wherein examples of the excellence of applicant's service is shown. The first example of August 30, 1968, and the fifth example of April 20, 1967, do not relate themselves to the time period shown on Page 2 showing transportation service required. However, it is interesting to note that with an injunction outstanding against the applicant, the Department of Defense tendered 22 truckloads to American Farm Lines to be picked up on one day and delivered all on one day. We are not informed whether these truckloads all moved in conformity with regulations involving movements by a Cooperative Association or that they were in compliance with the injunction against the carrier.

On Page 11 of Department of Defense's statement, we are advised that there is not a single carrier capable of providing a single line service between the midwestern, southern and southwestern states on the one hand, and on the other, all points in any of the five involved western states. However, nowhere in the statement is it explained why service is required to *all* points at any given time as specific points are named as typical origins and destinations.

It should be noted that in the Reply to Petition For Reconsideration, filed by Curtis L. Wagner on October 16, 1968, the prevalent theme of the statement was the monetary savings to the Government by utilizing the service of American Farm Lines. Whereas, the statement of Mr. Caputo states that by having to use carriers holding "bits pieces" of authority precludes the rendering of expeditious service, is inherently inefficient and thus subverts efforts to establish the most economical and efficient distribution system. The inference is thus made that a nominal savings can be incurred by utilizing irregular route carriers. Is this variance in statements due to the fact that the "Reply" is contrary to Chapter 105 of the *Military Traffic Management Regulations*? Paragraph 1050026 thereof provides:

> "Applications for operating rights will not be supported when the effect is simply to provide additional service; or to provide a large number of participating carriers; or to provide single-line service when adequate interline service exists; or to provide lower rates."

Or, is there variance best explained in that this Commission will not entertain an application for authority when in effect it is a rate matter, rather than a need for additional service?

The statement of Mr. Caputo supports the application in its entirety which is for both less than truckload and truckload authority. It should be pointed out here that the record will reveal that American Farm Lines, in compliance with the Commission's order of September 3, 1968, filed its Tariff MF—I.C.C. No. 1, which published rates only on minimum weights of 38,000 and 30,000 pounds, respectively. American Farm Lines, thus by its own publication, limited the scope of its authority granted to it. The effect of its publication was to place an unauthorized embargo on all shipments below the weight categories shown above. This

tariff publication, although ultimately rejected and returned to the proponent, did show that American Farm Lines did not intend to perform the complete service for which it was being supported.

Transcon Lines has never been appraised by the Department of Defense that its service has been inadequate or that the Department desired Transcon to seek additional authority to expedite military shipments or to provide a more complete service. It is submitted that there is adequate service available to meet the needs of the Department of Defense.

Respectfully submitted,

JEROME BINIASZ
Jerome Biniasz

* * *

VERIFICATION

COUNTY OF LOS ANGELES }
STATE OF CALIFORNIA } ss.

JEROME BINIASZ, being first duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

JEROME BINIASZ

Subscribed and sworn to before me, a notary public for the above named state, this 10th day of December, 1968.

MARY LOU WEST

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket MC 129908 TA

AMERICAN FARM LINES

Verified Statement of United-Buckingham Freight Lines, Inc. and Norwalk Truck Lines Inc.

STATEMENT OF THE CASE

This is an application for temporary authority which was announced in the May 28, 1968 issue of the Federal Register page 7796. The applicant is seeking the following common carrier authority by motor vehicles over irregular routes.

> General commodities, including classes A and B explosives, but restricted to traffic moving on Government bills of lading, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas on the one hand, and on the other, points in Washington, California, Nevada and Arizona.

The supporting shipper is the Department of the Army, office of Judge Advocate General, Washington, D. C. 20310.

In accordance with the notice in the Federal Register, protest was filed by United-Buckingham Freight Lines, Inc. and Norwalk Truck Lines Inc. with Mr. C. L. Phillips, District Supervisor, Interstate Commerce Commission, Bureau of Operations in Oklahoma City, Oklahoma.

The Temporary Authorities Board in processing the application denied the application. This was under date of July 12, 1968.

The applicant filed a petition for reconsideration before your Commission to which these protestants filed a reply. Division One, acting as an appellate division, on September

3, 1968 reversed the Temporary Authorities Board and granted the application for temporary authority.

These protestants then timely filed a petition for reconsideration. This petition has not as yet been acted upon.

By order dated November 5, 1968 Division One, acting as an appellate division, issued an order in which they reopened the record for receipt of verified statements on behalf of both the applicant and protestants. December 6, 1968 was set as the date by which protestants may submit verified statements in response to any statement submitted by the applicant.

The order of the Division states that after the protestants have submitted their verified statements, that the Commission on reconsideration would reconsider the application on "the record as made, together with such verified statements as may be filed". In view of the fact that the Commission will give consideration to previous pleadings filed by these protestants, protestants will not further burden the record by repeating information which has already been submitted by them, but would direct your Commission to the information previously submitted by protestant together with information submitted in the original pleading setting forth the authority of the protestants and their ability to provide the involved transportation service.

VERIFIED STATEMENT OF J. MAURICE ANDREN

My name is J. Maurice Andren. I am employed by United-Buckingham Freight Lines, Inc. I have been employed by this company since 1957 and since 1961 have been manager of I. C. C. applications.

My duties require me to collect information from the books and records of United-Buckingham Freight Lines, Inc. and make that information available to regulatory bodies including the Interstate Commerce Commission.

United-Buckingham Freight Lines has authority from your Commission to control Norwalk Truck Lines Inc. and Norwalk Truck Lines Inc. of Delaware. This control was authorized by your Commission in Docket MC-F-9775. Control was accomplished on October 25, 1967.

I am submitting this verified statement on behalf of Norwalk Truck Lines Inc. and United-Buckingham Freight Lines, Inc. protestants in this proceeding.

My duties also require me to collect information from the books and records of Norwalk Truck Lines Inc. and Norwalk Truck Lines Inc. of Delaware and present such information to regulatory bodies.

I filed the original protest on behalf of these two protestants with Mr. C. L. Phillips, District Supervisor of the Interstate Commerce Commission located at Oklahoma City, Oklahoma. I have just re-read this protest and here incorporated in this verified statement the information and statements made in that protest.

I call attention to the fact that in the protest I stated that these protestants were not objecting to the grant of the authority between points in California, Nevada and Arizona on the one hand, and, on the other, Kentucky, Arkansas, Louisiana, Texas and Oklahoma.

I have read the statement of Vincent F. Caputo submitted on behalf of the Department of Defense in support of the grant of temporary authority.

I have noted on pages 3 and 4 the origins and destinations between which the supporting shipper has traffic moving. Of those mentioned, protestant in his Subs 158 and 192 has authority to serve St. Louis, Missouri. Kansas City, Missouri can also be served by protestants in the same Subs and participate in traffic from Lake City, Missouri, which is just outside of Kansas City, Missouri. The same is true with respect to Alton, East Alton and Granite City,

Illinois, which are just outside of St. Louis, Missouri. Sub-158 authorizes protestant to serve Atchison, Parsons, Wichita and Junction City, Kansas. Sub 104 authorizes service to Tacoma, Washington. All of these references are to the authority of United-Buckingham Freight Lines, Inc.

I have noted what the supporting shipper states with respect to their requirements for rush service in order to meet departing ships from the West Coast. These protestants regularly are called upon by the Government to meet schedules such as these and when traffic is tendered to us under those circumstances except for mechanical failure or otherwise uncontrolled factors, protestants have been meeting those schedules. In some instances special efforts are made to meet the schedules. Protestants regularly employ two-man driver teams to provide for the movement of their vehicles and are in a position of expeditiously moving merchandise to meet the supporting shipper's requirements.

I have noted what the supporting shipper has said with respect to carriers that are required to operate over regular routes. Much of the authority of these protestants is required to be over regular routes. However, it would be the unusual situation if these protestants in operating over the regular routes were required to operate over routes that were circuitous to such an extent that it would have an appreciable affect upon the delivery time. Protestants have sought from your Commission and have secured the authority to operate over reasonably direct routes either in the form of grant of original operating authority or in the form of grant of alternate route authority. Reference to my operating authority appendix attached to my original protest will disclose numerous regular route as well as alternate route authorities. Reference to the map that I submitted with by original protest will indicate the extent to which protestants are able to operate over reasonably

direct routes. The arguments advanced by the supporting shipper with respect to regular route operation, in my opinion, do not apply to these protestants.

I have noted the Commission's regulations that the supporting statements shall set forth among other things: "The names and addresses of the existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal." Nowhere in the presentation made by the supporting shipper is any reference made to any service failure or refusal on the part of either of these protestants to provide this service which the supporting shipper needs. In the territory in which protestants operate, I believe the protestants can meet the reasonable requirements of the supporting shipper.

I have noted the comments made by the supporting shipper on pages 17 and 18 in which it describes what might be termed "fragmented authority", of the existing carriers. If existing carriers' authority is inadequate, it is partly the responsibility of the supporting shipper for that situation. These protestants have on numerous occasions contacted the supporting shipper inquiring as to whether or not their existing authorities are adequate to meet the supporting shipper's needs and particularly in the territory in which they operate. Until just recently, the response to these protestants has been that the supporting shipper has adequate service to meet their existing needs. The complete reversal of that position is evident, however, recently in this and other instances in which the supporting shipper has supported carriers for additional operating authority.

J. Maurice Andren

VERIFICATION

STATE OF SOUTH DAKOTA }
COUNTY OF PENNINGTON } ss.

J. Maurice Andren, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.

J. MAURICE ANDREN
J. Maurice Andren

Subscribed and sworn to before me this 4th day of December, 1968.

LEONA TOMASSI
Notary Public

My Commission expires
December 8, 1972.

ARGUMENTS

The section of the Interstate Commerce Act which provides the guidelines for the consideration of the instant matter is that set forth in Section 210a(a). This section of the Act reads

> "To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle as the case may be."

The carrying out of these responsibilities by your Commission also includes guidelines set forth in the National Transportation policy enunciated by the Congress. Such policy sets forth the following:

> "It is hereby declared to be the National Transportation policy of the Congress to provide for fair and

impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; *to promote safe, adequate, economical, and efficient service and foster sound economic conditions* in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, *without* unjust discriminations, undue preferences or advantages, or *unfair or destructive competitive practices;* to cooperate with the several states and the duly authorized officials thereof; to encounter fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a National transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and the National Defense. All of the provisions of this Act shall be administered and enforced with a view of carrying out the above declaration of policy." (Emphasis supplied)

In the opinion of these protestants the fulfillment of the requirements of the Interstate Commerce Act call for the reversal of the previous grant of authority to the American Farm Lines and the denial of the application for temporary authority. In support of these statements, protestants set forth the following arguments.

This is a situation in which existing transportation carriers were called upon and did respond to the needs of the supporting shipper. Approximately two years ago the applicant approached the supporting shipper and began to receive traffic from the supporting shipper. This traffic which the applicant received was traffic which had been previously handled by the existing transportation system and thus the applicant has made inroads upon and taken away from that existing transportation system traffic which

had previously been handled by existing carriers. The statement by the supporting shipper on page 19 that the service of the applicant will be used to complement rather than replace service from the existing carriers thus has not been demonstrated to be correct to your Commission. The supporting shipper has not stated that American Farm Lines is handling new traffic which had not previously existed, but rather it is obvious that the supporting shipper will use the applicant to transport traffic that at one time had been moving by existing carriers.

What will happen is what has happened in the past. That is that the applicant will seek to handle the more desirable type of traffic and leave to existing carriers the responsibility of handling the less desirable type of traffic. The supporting shipper obviously has both less than truckload and truckload traffic available. The applicant in the past has not shown its ability to handle all of the types of traffic of the supporting shipper over the vast territory in which it seeks authority to operate but has instead selected the more desirable type of traffic. This is not the type of a situation which will foster sound economic conditions in the transportation industry.

If the supporting shipper finds that it needs additional transportation service, its solution to the problem is to provide the support for the necessary authority of the existing carriers in the areas in which transportation service is needed.

The operations of the applicant are not unusual. They are the normal type of operations that are employed by these protestants and the industry in general in the movement of its merchandise. To move freight by two-man teams which provide for the constant flow of freight is something that is the regular practice. One needs only to note the equipment on the highways of the United States to note the large amount of two-man team operations that

are being conducted by the existing transportation industry, including these protestants.

Nowhere in the statement of the supporting shipper as required by the Commission's regulations has there been any evidence submitted that these protestants have been unable to meet the needs of the supporting shipper. Yet this is one of the factors which your Commission's regulations require that a supporting shipper present. Without such presentation of facts the applicant and his supporting shipper have failed to meet the requirements of your Commission's regulations and under the present interpretation given the Interstate Commerce Act by the courts, the application must be denied.

In your Commission's order providing for the submission of verified statements, in the first ordering paragraph your Commission required the supporting shipper to submit this information. (This was a qualified requirement that it be presented "to the extent the National Defense and Security will permit disclosure". No contention has been advanced by the supporting shipper that the National Defense and Security did not permit complete disclosure.)

The applicant and its supporting shipper have failed to set forth the necessary facts required by your Commission in order to warrant the grant of temporary authority as sought by the applicant. Under the circumstances, the application should be denied. We therefore urge the Commission on reconsideration to deny the application for temporary authority.

Respectfully submitted,

J. Maurice Andren
J. Maurice Andren

I. C. C. Practitioner for Protestant United-Buckingham Freight Lines, Inc. and Norwalk Truck Lines Inc.

BEFORE THE
INTERSTATE COMMERCE COMMISSION

No. MC-129908 T. A.

AMERICAN FARM LINES
TEMPORARY AUTHORITY APPLICATION

Verified Statement of Eric L. Spitler

I am Eric L. Spitler, Vice President-Traffic and Sales for United Transports, Inc., located at 4900 North Santa Fe, Oklahoma City, Oklahoma.

United Transports, Inc., hereinafter referred to as "United", filed a protest in the original application in this matter dated June 17, 1968, which sets forth our position. A copy of that original protest is attached hereto. The instant statement is made by myself in reply to the statement filed by American Farm Lines, applicant, of Vincent F. Caputo, Director for Transportation and Warehousing Policy of the Department of Defense. That statement was filed by applicant pursuant to the order of the Commission served November 5, 1968, which reopened this matter for the receipt of additional evidence.

United transport automobiles, trucks, tractors, chassis, bodies, and parts thereof, in secondary truckaway movements under Certificates Nos. MC 71902 and subs thereunder. United originally protested this application because of the wide territorial scope involved and the completely unrestricted nature of the commodity descriptions which were requested. As this case has developed, and particularly after the receipt of the statement of Vincent F. Caputo, it seems to become clear that the Department of Defense is interested in the transportation of explosives and general commodities as the term is normally used, and not in the transportation of the commodities which may be transported by United.

On the other hand, while it does not appear that the Department of Defense is seeking additional transportation for those named commodities, the applicant has not offered to restrict the application against the transportation of those commodities. I can only assume, however, that Mr. Caputo is not speaking, in his statement, of automobiles, trucks, tractors, chassis, bodies, and parts thereof, because he makes no statement which relates to such items. All of the statements which he makes relate either to Class A and B explosives or to general commodities as that term is generally used. I have been over the statement of Mr. Caputo completely, and find that he speaks of Class A and B explosives, general commodities, or freight of all kinds, in all instances, except where specific commodities are enumerated on pages 5, 6, 9 and 20 of his statement. In none of these listings does he make any mention of automobiles, trucks, tractors, chassis, bodies or parts thereof.

In its Sub Nos. 35 and 53, United can and does provide single-line service on all the commodities above enumerated between the origin states of Missouri, Oklahoma, Kansas, Texas, and Texarkana, Arkansas, on the one hand, and Arizona, on the other. It can provide interline service from those origin states to points in all the rest of the destination states involved.

If the certificate which is ultimately issued to American Farm Lines by virtue of this application, if any, is restricted against the transportation of automobiles, trucks, tractors, chassis, bodies and parts thereof, the interests of United in this application would be removed. The insertion of such a restriction in any certificate which may be issued is completely warranted because of the matters which I have discussed above, and it is my request that the Commission so restrict any certificate which it may see fit to grant to the applicant pursuant to the reopened hearing in this matter.

ERIC L. SPITLER
Eric L. Spitler

BEFORE THE
INTERSTATE COMMERCE COMMISSION

MC-129908 TA

AMERICAN FARM LINES
TEMPORARY AUTHORITY

Motion to Strike Purported Verified Statement of Vincent F. Caputo

COME Now the Protestant Western Railroads named in the appendix to their joint Protest served June 10, 1968 and, in lieu of filing Verified Statements, move to strike the purported Verified Statement of Vincent F. Caputo served November 20, 1968, and in support of their motion show:

I.

Notwithstanding the pendency of CA-3828, *Black Ball Freight Service, et al* v. *U. S., et al*, in the United States District Court for the Western District of Washington, and notwithstanding the fact that the entire Commission has denied request for a finding of General Transportation Importance, Division 1, acting as an Appellate Division, which had already acted herein, reopened this proceeding for the purpose of receiving and considering a Verified Statement of the Department of Defense and statements of protestants in response thereto. The order reopening the proceeding seemingly presupposes the existence of an immediate and urgent need which cannot be met by existing carriers, for the Department of Defense was authorized to merely "specify the commodities and points between which" such conditions prevail.

Without acquiescing in the propriety and legality of the procedures prescribed herein by Division 1, acting as an Appellate Division, these Protestants move to strike the purported Verified Statement of Vincent F. Caputo.

II.

The above-described Protest pointed out several deficiencies in the original supporting statement determined by the Washington Court to be inadequate. The so-called Verified Statement of Vincent F. Caputo clearly fails to cure at least some of those deficiencies. Said Protest, therefore, is here adopted by reference and reurged.

III.

Whether considered separately, or in concert with the initial supporting statement, the Caputo statement fails to meet the prescribed essential minimum standards and must, therefore, be stricken and given no consideration.

IV.

Under the terms and provisions of Ex Parte No. MC-67, 49 CFR 1131.2, 98 M.C.C. 483, 486, the Commission required that supporting statements contain *at least* the information specified in eleven areas. Four of the categories are:

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(8) Whether efforts have been made to obtain the services from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for such failure or refusal.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

Neither the initial nor the Caputo statement shows (a) how the traffic is now moving, (b) whether efforts have been made to obtain the services from existing motor, rail, or water carriers, and the dates and results of such efforts, and (c) the names and addresses of existing carriers which have failed or refused to provide the service, and the reasons given for same. Further, the Caputo statement fails to identify other carriers supported for substantially the same authority, such as Lee Way Motor Freight, Inc. in MC-61440 (Sub 112 TA).

V.

The above rules have the force and effect of statute. They are binding upon the Commission as well as upon the general public. The judiciary will determine that the Commission's waiver or disregard of its own rules is arbitrary and capricious. See *Acme Cartage Co., et al* v. *U. S., et al*, U.S.D.C. Western District of Washington, Southern District, October 4, 1968, — F. Supp. —, 1968, F.C.C. 82,041; *Mississippi Valley Barge Line Co., et al* v. *U. S., et al*, 252 F. Supp. 162; *Columbia Broadcasting System* v. *U. S.*, 316 U.S. 407; *Columbia Broadcasting System* v. *U. S.*, 317 U.S. 422.

VI.

The Commission's responsibility in this regard is not relaxed by the fact that the supporting shipper is the Department of Defense. The only mention of that Department in the rules cited above appears in Rule 1131.2 (c) which, in part, provides that its supporting statement may be furnished directly to the Temporary Authorities Board instead of the appropriate Field Office. And, as pointed out at Pages 2 and 3 of the adopted and reurged Protest of Western Railroads, the Commission itself has held that when supporting applications, a governmental agency stands in the same position as a commercial shipper.

In any event, it could not possibly be claimed in connection with the movements recited in the verified statement that the disclosures required in 3, 8, 9 and 11 above are classified information.

VII.

Irrespective of the correctness and lawfulness of the procedures specified in this matter, the so-called verified statement of Vincent F. Caputo does not supply the minimum information required by the rules promulgated in Ex Parte No. MC-67. This is so whether the statement is considered singly or together with the initial supporting statement.

VIII.

Accordingly, no purpose would be served by the filing of Verified Statements by these Protestants.

WHEREFORE, for the reasons stated in their Protest and in this Motion, Protestant Western Railroads move that the purported verified statement of Vincent F. Caputo be stricken and given no consideration.

Respectfully submitted,

PROTESTANT WESTERN RAILROADS
By:

ED WHITE
280 Union Station
Chicago, Illinois 60606
312/726-6900
Their Attorney

Order

Service Date December 20, 1968

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C. on the 19th day of December 1968.

No. MC-129908 TA

AMERICAN FARM LINES
(Oklahoma City, Okla.)

Upon consideration of the record in the above-entitled proceeding granting to American Farm Lines on September 3, 1968, a 90-day temporary authority to conduct motor common carrier operations and transport general commodities, including Class A and B explosives, moving on a Government bill of lading, over irregular routes, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and, on the other, points in Arizona, California, Nevada, Utah and Washington and (1) the entry of a temporary restraining order on October 3, 1968, by the United States District Court for the Western District of Washington in Civil Action No. 3828, *Black Ball Freight Service, et al.* v. *United States,* enjoining the order of September 3, 1968, from going into effect or otherwise becoming operative; and (2) the filing on various dates in September and October 1968, of numerous petitions of protestants for reconsideration of the said order of September 3, 1968; and replies thereto by applicant and the Department of Defense and (3) the Commission's order of November 5, 1968, reopening the proceeding for the purpose of receiving evidence from the respective parties in the form of verified statements; and

It appearing, That as a result of the said order of November 5, 1968, there were filed verified statements and a

number of pleadings directed to the said order of November 5, 1968, and/or to the various verified statements, all of which are now a part of the record before us on reconsideration and have been considered, but will not be specifically described in this order.

It further appearing, That by its verified statement, filed November 20, 1968, the Department of Defense has established:

(1) That, in discharging its responsibility for the conduct of the Nation's defense, it imperatively requires service over the most direct routes in a minimum transit time to effect movement of a vast quantity of numerous commodities between innumerable points and places within the United States and abroad:

(2) That it has experienced inefficient and circuitous joint-line transportation by the use of existing carrier services which have been deficient for its needs, particularly relating to the coordination of the arrival of inbound shipments with the production schedules of manufacturing installations and the departure times and transshipment dates of matters and materials necessary to the national defense;

(3) That it has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs;

(4) That there is nothing in this record to establish that any of the protesting carriers provide a service to meet its needs;

(5) That unless applicant is granted the temporary authority sought herein, the Department of Defense will be without an expedited and flexible service for which it has an immediate and urgent need necessary to the defense of the country; and

(6) That, in balancing the scales of public interest, it is necessary to assure that the Government's immediate and

urgent transportation requirement be met by an expedited and flexible service which will be used to complement rather than replace eixsting services.

Wherefore, and good cause apeparing therefor:

It is ordered, That applicant be, and is hereby, granted temporary authority, conditioned upon full compliance with all applicable, statutory and Commission requirements concerning tariff publications, evidence of security for the protection of the public, and designation of agents upon whom process may be served, to engage in the business of transportation by motor vehicle, in interstate or foreign commerce, to the extent and in the manner set forth in the appendix hereto, subject to the further conditions that unless otherwise provided in the appendix, (1) the service herein authorized shall be limited to the movement of traffic which originates at and is destined to the points and areas specified in the appendix, and (2) no operating right separately described or with any other temporary or permanent authority now held by, or hereafter issued to, applicant or any other carrier.

It is further ordered, That the service provided for in this order shall not be commenced until all requirements have been met and applicant has received notice from the Commission and compliance has been effected and service may be instituted.

It is further ordered, That upon the authority herein granted becoming effective, failure of applicant to render reasonably continuous and adequate service to the public pursuant thereto and to maintain compliance with statutory and Commission requirements shall constitute sufficient grounds for suspension, change, or revocation of the said authority.

It is further ordered. That if applicant fails to comply with all applicable statutory and Commission requirements, rules, and regulations within 30 days from the date hereof,

or such additional time as the Commission may specifically grant, this order shall be of no further force and effect and the said application shall be deemed to be denied for want of prosecution and applicant so notified.

And it is further ordered, That except as herein granted the said application and the pleadings referred to in the second paragraph hereof, be, and they are hereby, denied.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON
Secretary

(SEAL)

APPENDIX

No. MC 129908 TA

AMERICAN FARM LINES
OKLAHOMA CITY, OKLAHOMA

By the order of which this appendix is a part, entered under the name and number shown above, applicant upon compliance with the conditions set forth therein and after receipt of notice from the Commission that the said conditions have been met, and provided the operations are begun within the time allowed in said order or any extension thereof, is authorized to engage in the business of transportation by motor vehicle, in interstate or foreign commerce as follows:

Time for which authority is granted—180 days

Type of carrier—Common

Service authorized—

General commodities, including Classes A and B explosives, moving on Government bill of lading, over irregular routes,

Between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Utah and Arizona.

SAFETY CONDITION: This grant of authority is conditioned upon applicant's maintenance of a satisfactory degree of compliance with the Federal Highway Administration's (Department of Transportation) Motor Carrier Safety Regulations. In the event of non-compliance with these regulations, that Administration may submit a recommendation for revocation of the authority.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

Civil Action No. 3828

BLACK BALL FREIGHT SERVICE, ET AL., *Plaintiffs and Intervening Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

Supplemental Complaint Setting Forth Transactions or Occurrences or Events Which Have Happened Since the Date the Original Complaint Was Filed Herein

Plaintiffs and Intervening Plaintiffs respectfully petition this Honorable Court for a decree setting aside and annulling certain order of the Interstate Commerce Commission, hereinafter referred to as the "Commission", made and entered in the Commission's Orders entitled, "Docket MC-129908TA, American Farm Lines (Oklahoma City, Oklahoma)", on December 19, 1968, served December 20,

1968, and for cause of complaint against the defendants allege:

I

That as to the entities of the plaintiffs and intervening plaintiffs reference is made to the allegations concerning the same contained in the original complaint and the petitions for leave to intervene, which by this reference are made a part hereof.

II

That as to entity of the defendants, and the statutory basis and the venue, plaintiffs and intervening plaintiffs rely upon the allegations of paragraphs II, III, IV, and V of the original complaint herein, which by this reference is made a part hereof.

VI

That the controversy tendered by this complaint arises out of the issuance by the Interstate Commerce Commission of the order identified above, and set forth in Appendix A, hereto attached, and by this reference made a part hereof. Said order was supported by the Verified Statement of Vincent F. Caputo, Director of Transportation and Warehousing Policy of the Department of Defense, a copy of which statement is hereto attached, marked Appendix B and by this reference made a part hereof.

VII

That this Honorable Court entered an "Order Staying Going Into Effect Of Order" in this proceeding on October 2, 1968. This Court order stayed the going into effect of the prior order of the Commission in the same proceeding before it which it had issued on September 3, 1968, and which was attached to the original complaint herein as Exhibit A.

Other happenings related to the subject matter, not pertinent to the issues, but recited for informative purposes, are as follows: Prior to the Court's order of October 2, 1968 some of these plaintiffs had filed petitions for reconsideration under the erroneous assumption that the Commission's applicable rules permitted the filing of petitions for reconsideration. (The rules do not so permit). The Department of Defense under the date of October 16, 1968 filed a reply to these petitions as did applicant, American Farm Lines. The latter also filed a petition to reopen the proceeding. None of these activities were authorized by the Commission's rules, nor was an order by the Commission dated November 5, 1968, reopening the proceeding. Plaintiffs moved and petitioned to strike the unauthorized pleadings of the Department of Defense and of American Farm Lines and petitions to the Commission to vacate its order of November 5, 1968 on the grounds (a) that this Court had taken and retained jurisdiction of the matter, and (b) that such actions were contrary to the mandatory rules of the Commission. The Commission has taken no action on plaintiffs' petitions and motions, but instead issued the order here under attack.

Since the order under attack relies upon the verified statement of the Department of Defense, Appendix B hereof, attached hereto as Appendix C are five typical examples of the more than twenty reply verified statements to that of the Department of Defense, filed by the plaintiffs or intervening plaintiffs. (These were filed under duress as the Commission had taken no action on the various petitions to strike and to vacate the Commission's order of November 5, 1968). Appendix C is hereto attached for informative reasons only.

As indicated, the issues here are whether or not the Commission's order of December 19, 1968 (Appendix A) was unlawful by reason of (a) being in contravention of the jurisdiction of this Court, and (b) of not being in compliance with the Commission's mandatory rules relating to the issuance of temporary authorities.

VIII

That the Interstate Commerce Commission pursuant to authority conferred upon it by the Congress by the provisions of Sections 204(a)(6), 210a(a), 217, and 218 of the Interstate Commerce Act (respectively 49 U.S.C. Sections 304(a)(6), 310(a)(a), 317 and 318) and Sections 4 and 9(b) of the Administrative Procedure Act (respectively 5 U.S.C. 1003 and 1008(b)), instituted a proceeding "for the purpose of determining whether certain proposed rules, or any other rules, should be prescribed to govern the filing, processing and determination of applications by motor common and contract carriers for temporary authority." That to said proceeding the Commission assigned the docket and title of "*Ex Parte No. MC-67, Motor Carrier Temporary Authorities*". That on April 7, 1965, the Commission formally enunciated its decision in said proceeding, as reported in 98 M.C.C. 483 et seq. That in said decision, as here pertinent, it was mandatorily required at page 486 of the report:

> "(c) *Supporting statements.*—Each application for Temporary Authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense, must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:
>
> (1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known."

It was further provided at page 490:

"(b) *Standards for determination.*—The following standards shall be used by the Temporary Authorities Board, and by Division 1 of the Commission acting initially or in an appellate capacity, in the absence of special or unusual circumstances, in the determination under section 210a(a) of the Interstate Commerce Act (49 U.S.C. 310a(a)) of applications for temporary authority.

(1) *General.*—Grants of temporary authority shall only be made upon the establishment of an immediate and urgent need for the transportation of passengers, or of particular commodities or classes of commodities, from specified origin points or areas to specified destination points or areas, having no carrier service capable of meeting such needs. Requests for temporary authority involving service to or from entire states, counties, or other defined areas will warrant approval only when supported by evidence that there is a compelling need for service to or from a representative number of points in each such state, county, or area, that there is a reasonable certainty that such service will be utilized, and that there is no carrier service available capable of meeting such need. Otherwise, such grants will be limited in accordance with the evidence to point-to-point authorization covering the immediate and urgent need for service."

It was further provided at page 491:

"(2) *Immediate and urgent need.*—An immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service. Such a showing may in-

volve a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed."

It was further provided at page 496:

"(a) *Petitions for reconsideration.*—Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person."

IX

That as to the order, which is the subject of this Complaint, the Commission (as in its former order of September 3, 1968) failed to comply, and to require applicant to comply with its formally promulgated rules set forth in paragraph VIII, supra, and in particular with the requirements of (7), (8), and (9). Not a single one of the ten plaintiffs, including the twenty-seven intervening railroad plaintiffs and the five intervening motor carrier plaintiffs, or any other carrier is identified as having failed or refused to provide the service. The identity of not one existing carrier is revealed, nor is any information given as to whether shipments move by motor, rail or water.

X

That each of the plaintiffs and intervening plaintiffs made appearances in the Temporary Authority Proceeding.

XI

That the order herein complained of, and as is set forth in Appendix A, is administratively final, and plaintiffs have exhausted all of their remedies before the Interstate Commerce Commission.

XII

Plaintiffs allege that in making and entering said order, the Interstate Commerce Commission exceeded its statutory and constitutional powers, and committed errors of law, in the following particulars:

(1) In that the Commission issued temporary authority to American Farm Lines without complying with the mandatory standards promulgated in its *Docket Ex Parte 67,* that is, without establishment "of an immediate and urgent need for the transportation of * * * particular commodities or classes of commodities, from specified origin points or areas to specified destination points or areas, having no carrier service capable of meeting such needs."

(2) In that the Commission issued temporary authority to American Farm Lines without complying with the mandatory standards promulgated in its *Docket Ex Parte 67,* that is, without requiring establishment as to "service to or from entire States, counties or other defined areas" * * * "that there is a compelling need for service to or from a representative number of points in each such State, County, or area", and "that there is a reasonable certainty that such service will be utilized, and that there is no carrier service available capable of meeting such need."

(3) In that the Commission issued temporary authority to American Farm Lines without requiring compliance with the mandatory requirements promulgated in its *Docket Ex Parte 67,* that is, by complying

with the requirements specified on pages 4, 5 and 6 hereof.

(4) In that the Commission failed, despite its duty under the National Transportation Policy "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation."

WHEREFORE, plaintiffs respectfully pray as prayed for in the original complaint, and:

3. That after final hearing, this Court adjudge, order and decree that said Order of the Interstate Commerce Commission as is identified in Appendix A in this supplemental complaint, is, and at all times has been, beyond the lawful authority of the Interstate Commerce Commission, and is wholly unlawful and void, and that said order be perpetually set aside, cancelled and annulled;

4. That the plaintiffs have such other and further relief in the premises as the Court may deem just and equitable.

EISENHOWER, CARLSON, NEWLANDS, REHA & SINNITT

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James F. Henriot
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Tacoma, Washington 98402

WILLIAM B. ADAMS
William B. Adams
624 Pacific Building
Portland, Oregon 97204

Order

Now, on this 6th day of January, 1969, upon the motion of AMERICAN FARM LINES for leave to intervene herein as party defendant pursuant to the provisions of 28 U.S.C.A. 2323 it appearing to the court that:

1. AMERICAN FARM LINES was the applicant for temporary authority to operate as a common carrier in Interstate Commerce Commission Docket MC-129908 TA. American Farm Lines, Oklahoma City, Oklahoma.

2. That AMERICAN FARM LINES application was granted by the commission by their order of December 20, 1968 which is sought to be enjoined herein.

3. That pursuant to the provisions of 28 U.S.C.A. 2323 the motion of AMERICAN FARM LINES for leave to intervene should be granted.

It is, therefore, ORDERED, ADJUDGED AND DECREED that AMERICAN FARM LINES be granted leave to intervene herein as party defendant.

DATED this —— day of January, 1969.

.....

Judge
United States District Court,
Western District, Southern
Division

[1] TRANSCRIPT OF PROCEEDINGS held in the above-entitled and numbered cause in the above-entitled court on Monday, January 6, 1969, before the Honorable GEORGE H. BOLDT, United States District Judge, at the United States Courthouse, Tacoma, Washington.

APPEARANCES

On behalf of the Plaintiffs:

Mr. William B. Adams,
Adams, McLaughlin & Simpson,
Attorneys at law,
624 Pacific Building,
Portland, Oregon 97204.

On behalf of the Defendants:

Mr. Charles W. Billinghurst,
Assistant U.S. Attorney,
Federal Building,
Tacoma, Washington.

[2] PROCEEDINGS

The Court: The ultimate questions to be presented and determined in this case are not entirely clear at this time, and even if they were, I would offer not the slightest indication of my views thereon excepting only insofar as necessary for the purpose of considering an application for a restraining order, which, of course, is a very limited matter.

• • • • • • • • • • •

I will briefly summarize the chronology of events as I have it from reading the material you have presented to me in connection with this hearing.

• • • • • • • • • • •

[4] On October 16 the defendants and the Department of Defense and American filed replies to petitions for rehearing, which apparently had been filed with the appellate division sometime prior to October 2, the date of

the hearing in this court. Again the date of those filings is not found in the record. On November 5th, approximately a month later, the appellate division entered an order reopening the same file numbers of the Commission, as to which this court had entered the restraining order, and undertook to receive further evidence concerning matters then within the jurisdiction of this court without applying for modification of the restraining order, notifying this court or otherwise noting the fact that this court had and has jurisdiction of the review sought by plaintiffs. [5] If an application had been made to modify the restraining order for a limited purpose, probably it would have been given sympathetic consideration, provided the rights of all concerned were not adversely affected. On that same date, by the way, American in addition to its other filing filed a petition for the appellate division to reconsider its prior decision. On the 20th of November the Computo verified statement was filed. Presumably other material was also received in that interim, but the Computo statement appears to be the basis on which, without any application or notification to this court, on the 19th of December the appellate division enters an order in the same file under review in this court again granting temporary authority to American. Just the recital of it indicates there is something incongruous about it, and exactly what that may be remains to be determined. But certainly there is something unusual or extraordinary about such a business as that.

Order Staying Going Into Effect of Order

This cause having come on for consideration upon the motion of the plaintiffs for an order staying the going into effect of an order of the Interstate Commerce Commission pursuant to the provisions of Title 5 U.S.C., Sections 702, 703, 704 and 705, and Title 28, Section 2284(3), pending determination of the issues of this proceeding, or until the further order of the Court, said motion being

based upon the verified complaint herein and the affidavits of Earl J. Brooks, Jerome Biniasz, Bill D. Gardner, Mitch Hirsch, Glen Ashworth, Fred S. Anderson attached to the motion, and others, and those of Forrest Arnold, Edward A. Upp, A. John Warren and W. J. Wilson attached to the former motion to stay herein, and the testimony of record received on October 2, 1968 relative to the prior motion and the Court, from said complaint, motion, and the said affidavits and testimony of record, finds that unless this order is entered plaintiffs will suffer irreparable damage to their services as motor common carriers and to themselves, particularly in the areas of lost revenue, investments in equipment and facilities, and the Court being advised in the premises:

IT IS ADJUDGED AND ORDERED that that certain order of the Interstate Commerce Commission issued by it in its Docket MC-129908TA application of American Farm Lines, Oklahoma City, Oklahoma under date of Dec. 19, 1968, be stayed from going into effect and is hereby declared to be inoperative pending a determination by this Court of the issues of this proceeding, or until the further order of the Court.

Dated and done at Tacoma, Washington, in said District this 6th day of January, 1969.

/s/ J. BOLDT
Judge

Answer of the Intervenor, American Farm Lines

Comes now the Intervenor, American Farm Lines, and for answer to the supplemental complaint alleges and states:

First Defense: Intervenor admits the allegations contained in Paragraphs I, II, III, IV, V, VI, VIII and X of the plaint and denies the allegations contained in Paragraphs

X, XI and XII demanding strict proof thereof. Intervenor admits the allegations contained in the first numbered paragraph under Paragraph VII and moves to strike the remainder of Paragraph VII on the grounds that the statements contained therein are admittedly immaterial to the issues herein and do not constitute answerable pleadings.

Second Defense: The intervenor alleges that the order of the Interstate Commerce Commission Division 1, entered on December 19, 1968 and served on December 20, 1968 in its Docket MC-129908 TA, American Farm Lines, Oklahoma City, Oklahoma, attached to the complaint as Exhibit "A" was a lawful exercise of power by the Interstate Commerce Commission as provided in § 210(a) of the Motor Carrier Act, Title 49 U.S.C.A. § 310(a).

Third Defense: The intervenor alleges that the plaintiffs herein have not been injured, irreparably or otherwise, by the action of the Interstate Commerce Commission complained of herein. That the issuance of an injunction against the order of the Interstate Commerce Commission in its Docket MC-129908 TA, American Farm Lines, Oklahoma City, Oklahoma would irreparably injure American Farm Lines and would be contrary to the public interest.

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Attorneys for the Intervenor

Joint Answer of the United States of America and the Interstate Commerce Commission to the Initial Complaint, Filed September 26, 1968, and the Supplemental Complaint, Filed December 31, 1968

The United States of America and the Interstate Commerce Commission, defendants herein, answer the complaints as follows:

Initial Complaint, Filed September 26, 1968

I.

With respect to the allegations contained in the initial complaint, admit that the order of the Commission dated September 3, 1968, may not have been based upon evidence to support its conclusion. Defendants aver, however, that said order was not administratively final since there were properly pending before the Commission, pursuant to Rule 101(g) of the Commission's Rules of Practice (49 C.F.R. 1100.101(g)), numerous petitions for reconsideration filed by plaintiffs and others. Defendants further aver that the issues concerning the Commission's order of September 3, 1968, are moot for the following reasons: (1) this Court issued a temporary restraining order on October 2, 1968, enjoining the effectiveness and operation of said order; (2) the Commission reopened the administrative proceeding on November 5, 1968, in order to receive the evidence which this Court found was required to support a grant of temporary authority; (3) upon receipt of such additional evidence from all parties, the Commission issued its order of December 19, 1968, which again granted American Farm Lines the temporary authority now in question; and (4) by its order of December 19, 1968, the Commission sought to correct the deficiency found by this Court to exist in the prior order of September 3, 1968, without the unnecessary time-consuming expense of having a three-judge court convene to hear argument concerning an order which the Commission may have improvidently issued. Accordingly, the only remain-

ing issue concerns the validity of the Commission's order of December 19, 1968.

Supplemental Complaint, Filed December 31, 1968

II.

Admit the allegations of paragraphs I, II, and VI.

III.

Deny the allegations of paragraph VII, except to admit (1) the issuance by this Court of a temporary restraining order on October 2, 1968; (2) the filing prior thereto of petitions for reconsideration, and the subsequent filing of replies thereto, and a petition to reopen, and petitions to strike, and replies thereto; (3) the filing of a verified statement by the Department of Defense and replies thereto; and (4) the filing by plaintiff of certain petitions and motions with the Commission.

IV.

Admit the allegations of paragraph VIII.

V.

Deny the allegations of paragraph IX.

VI.

Admit the allegations of paragraphs X and XI.

VII.

Deny the allegations of paragraph XII.

VIII.

In further answer to the allegations of the complaint, deny that the order of the Commission dated December 19, 1968, is erroneous for the reasons specified or any other reason.

WHEREFORE, the United States of America and the Interstate Commerce Commission pray that the temporary restraining order be vacated, that the relief sought in the complaint be denied, and the complaint be dismissed.

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Washington, D. C. 20423

Attorneys for the Interstate Commerce Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

Civil Action No. 3828

Opinion, Findings of Fact, Conclusions of Law

BLACK BALL FREIGHT SERVICE; CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; D-C INTERNATIONAL, INC.; GARRETT FREIGHTLINES, INC.; NAVAJO FREIGHTLINES, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; WESTERN GILLETTE, INC.; RISS & COMPANY, INC.; IML FREIGHT, INC.; AND AMERICAN TRUCKING ASSOCIATIONS, INC., *Plaintiffs,*

YELLOW FREIGHT SERVICE; T.I.M.E. FREIGHT, INC.; TRANSCON LINES, INC.; CONSOLIDATED COPPERSTATE LINES; TRI-STATE MOTOR TRANSIT CO.; UNITED TRANSPORTS, INC.; BRASWELL MOTOR LINES, INC.; CENTRAL FREIGHT LINES, INC.; CENTRAL EXPRESS, INC.; RED ARROW FREIGHT LINES; BROWN EXPRESS, INC.; ALAMO EXPRESS, INC.; J. H. ROSE TRUCK LINE, INC.; J. J. WILLIS TRUCKING CO.; J. V. HARRISON TRUCK LINES, INC.; MILLER TRUCK LINE, INC.; H. S. ANDERSON TRUCKING CO.; CENTRAL FORWARDING, INC.; ROBERTSON TANK LINES, INC.; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE COLORADO AND SOUTHERN RAILWAY COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; ELGIN, JOLIET AND EASTERN RAILWAY COMPANY; FORT DODGE, DES MOINES AND SOUTHERN RAILWAY COMPANY; FORT WORTH AND DENVER RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; GREEN BAY AND WESTERN RAILROAD COMPANY; GULF MOBILE AND OHIO RAILROAD COMPANY; ILLINOIS CENTRAL RAILROAD COM-

PANY; ILLINOIS TERMINAL RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD; MISSOURI PACIFIC RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY; AND UNION PACIFIC RAILROAD AND WATERLOO RAILROAD, *Intervening Plaintiffs*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*,

AMERICAN FARM LINES, *Intervening Defendant*.

Before: JERTBERG, Circuit Judge, and BOLDT and GOODWIN, District Judges

BOLDT, District Judge:

American Farm Lines (AFL) made an application under the provisions of Section 210a(a) Interstate Commerce Act, 49 U.S.C.A. Section 310a(a)[1] and Ex Parte No. MC-67, *Motor Carrier Temporary Authorities*, 98 M.C.C. 483, 49 C.F.R. 1131, et seq., to the Interstate Commerce Commission (ICC) for a Temporary Authority to provide single-line motor carrier service. The application appeared

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[1] Interstate Commerce Act, Section 210a(a), as amended, 49 U.S.C. 310a(a), provides:

"To enable the provision of service for which there is an *immediate and urgent need* to a point or points within a territory having *no carrier service capable of meeting such need*, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter." (Emphasis added.)

in the Federal Register June 8, 1968. The thirty-five motor carrier plaintiffs in this action, twenty-eight intervening rail carrier plaintiffs and many other carriers, protested the application. The Temoprary Authorities Board of the Commission (TAB) by order dated July 12, 1968, denied the application. AFL filed a petition for reconsideration, appealing the decision of TAB. Division 1 of ICC, acting as an Appellate Division, by order dated September 3, 1968, vacated the order of denial issued by TAB and granted the application.

Some of the plaintiffs and other carriers filed petitions for reconsideration, which were not authorized by the applicable rule, Ex Parte No. MC-67, *Motor Carrier Temporary Authorities,* 98 M.C.C. 483 at page 496, (49 C.F.R. 1131.6), since neither of the conditions authorizing such petitions was present:

> "(a) Petitions for reconsideration.—Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person."

Plaintiffs' complaint was filed in this court on September 26, 1968, together with a motion for an order to stay the going effect of the ICC order of September 3, 1968.

This motion was argued October 2, 1968 before Judge Boldt per Title 28, Section 2284(3) and (5). After considering oral and written evidence and the argument of counsel, the Court entered an order staying the going into effect of the ICC order of September 3, 1968, and declaring it to be otherwise inoperative pending determination in this Court of the issues presented in this proceeding, or until further order of this Court. At that hearings, coun-

sel for ICC did not challenge the administrative finality of the ICC order of September 3, 1968. By its order of October 9, 1968, ICC recognized the stay order of this Court.[2]

On October 16, 1968, the Department of Defense filed with ICC a reply to the petitions for reconsideration, and on October 17, 1968, AFL filed a combined reply to the petitions for reconsideration and a petition to reopen. Many plaintiffs filed motions to strike these pleadings on the ground they were not authorized by ICC Rule 49 C.F.R. 1131.6, nor by any other rule.

On November 12, 1968, ICC filed in this court a "Motion to Stay Further Proceedings Herein," stating therein that on November 5, 1968, on its own motion, ICC had reopened the proceeding before it and requested a stay of further action in the case before this court. By their prompt opposition to this motion, plaintiffs contended that ICC was not authorized to reopen its proceeding because this court had taken jurisdiction of the matter. Also, plaintiffs asserted that even if the court had not taken jurisdiction, the ICC Rules precluded reopening of the proceeding.

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[2] "Upon consideration of the record in the above entitled proceedings, and the entry of a temporary restraining order on October 3, 1968, by the United States District Court for the Western District of Washington in Civil Action No. 3828, *Black Ball Freight Service, et al* v. *United States*, wherein the Court stated in part:

> 'IT IS ADJUDGED AND ORDERED that that certain order of the Interstate Commerce Commission issued by it in its Docket MC-129908TA application of American Farm Lines, Oklahoma City, Oklahoma under date of September 3, 1968, be stayed from going into effect or otherwise be inoperative pending a determination by this Court of the issues of this proceeding, or until the further order of this Court.'

and good cause appearing therefor:

It is ordered, that the effective date and operation of the order heretofore entered September 3, 1968, in No. MC-129908TA be, and it is hereby, postponed until further order of the Commission.

It is further ordered, that in view of the Court's order and of the order of the Commission, American Farm Lines may not now perform any for-hire operations in interstate or foreign commerce pursuant to the Commission's order of September 3, 1968, entered in this proceeding.

No action has ever been take not note the ICC motion for hearing or to otherwise procure the stay sought by the motion.

The same contentions were presented to ICC in plaintiff's motion for vacation of the reopening order.

Since the ICC order of November 5, 1968 recited that a verified statement from the Department of Defense would be received, and no ruling having been made on their petitions to vacate the order of November 5, plaintiffs responded to the Caputo verified statement submitted by teh Department of Defense. These responses asserted plaintiffs had satisfactorily performed all services previously requested of them and their willingness and ability to perform any service requested of them by any shipper, including the Department of Defense.

On December 19, 1968, ICC issued a new order in the same docket granting AFL the same temporary authority previously granted by the ICC order of September 3, 1968 as to which the stay order of this court was and still is in full effect.

On December 31, 1968, pursuant to Fed. Civ. R. 15(d), plaintiffs filed in this court a "Supplemental Complaint Setting Forth Transactions or Occurrences or Events Which Have Happened Since the Date the Original Complaint was Filed Herein" and a motion to stay the going into effect of the ICC order of December 19, 1968.

Following extended argument, on January 6, 1969, Judge Boldt entered an order restraining the going into effect of the ICC order of December 19, 1968 and ordering it to be inoperative until further order of this court. Full hearing on the merits was heard by the Three-Judge Court on January 24, 1969.

The issuance of the ICC order of September 3, 1968, was based on a supporting letter written by the Department of Defense, dated May 15, 1968. The ICC also had

before it a letter dated April 30, 1968 written to the president of AFL wherein the Department of Defense stated it was not in a position to verify that there would be insufficient or inadequate service to meet Department requirements in the absence of the single-line service AFL seeks to provide.

"As authorized by the ICC Act, after extended consideration the ICC adopted Temporary Authority Rules, effective July 5, 1965, specifying procedures for the submission and determination of temporary authority applications under Section 210(a) ICC Act. Ex Parte No. MC-67, 49 C.F.R. 1131. . . . The rules specifically provide in mandatory terms that each filed temporary authority application must be accompanied by one or more supporting statements and each such statement must contain at least the information specified in eleven categories," *Acme Cartage Co., et al* v. *United States, et al,* 290 F. Supp. 453 at page 454. Among those categories are:

"(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the date and results of such efforts.

"(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

The ICC Rules, 49 C.F.R. 1131 et seq., provide for the filing and processing of written temporary authority applications and establish standards and mandatory procedures applicable to all phases of the submission and determination of such applications. Except for supporting statements by the Department of Defense, the rules require "certified" evidentiary statements by the supporting shippers claiming to need the new service, and further require factual statements in a minimum of eleven specific categories. The rules require notice of the proceeding to be

given by publication in the Federal Register and authorize protest of the application by "persons who can and will provide all or any part of the proposed service". Each protest must specify the service the protestant can and will offer and must be served upon the applicant. Submission of supplemental data after the applications are filed is not permitted. The ICC rules establish specific evidentiary standards for determination of each application for temoprary authority and provide that grants "shall be only made" where the evidence "establishes" an immediate and urgent need in accordance with the prescribed standards.

Rule 49 C.F.R. 1131.4(b)(4) pertaining to single-line service provides:

> "Generally, the desire of a shipper for single-line service in lieu of existing interchange or connection-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved."

Plaintiffs assert the initial supporting letter accompanying AFL's temporary application did not provide the information required by 49 C.F.R. 1131.2(c), particularly (8) and (9) thereof, and that granting of the temporary authority in question without a showing of the required information in effect denied them consideration of their protests. Plaintiffs contend no specific failure of service by plaintiffs has been asserted to which specific response could be made and that their response to generalities could only be met by their general assertions.

In their answer, defendants admit:

"With respect to the allegations contained in the initial complaint, admit that the order of the Commission dated September 3, 1968 may not have been based upon evidnece to support its conclusion."

In their brief, the defendants admit:

"* * * That the Commission's order of September 3, 1968 (1) may not have been based upon evidence to support its conclusions."

These concessions indicate the ICC itself had strong misgivings concerning its compliance with the rules ICC itself had promulgated.

Defendants contend the ICC order dated September 3, 1968 became moot when ICC reopened the proceeding on November 5, 1968. This contention is without merit. Prior to reopening of the proceeding which resulted in the ICC order of September 3, 1968, judicial review of that order had been perfected pursuant to 28 U.S.C. 1336. Jurisdictio thereof vested in and had been exercised by this court in an extended evidentiary hearing wherein ICC actively participated. Following such hearing the stay order of this court was entered. In these circumstances, without prior leave of court, ICC was without authority to take any action which directly or indirectly might nullify or impair the jurisdiction of this court over the ICC order under review.

Defendants further contend that the ICC order of September 3, 1968 was not administratively final. However, at the oral argument on the merits defendants conceded that plaintiffs were properly in court seeking review of that order.

Plaintiffs assert that the September ICC order was administratively final under the Temporary Authority Rules, 49 C.F.R. 1131.6, and that if those rules do not govern, the general ICC rule, 49 C.F.R. 1100.101(a)(2), is applicable:

"All decisions, orders or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, charges or modifies a prior decision by a *hearing officer*, and those wherein the initial decision is made by a division." (Emphasis added.)

Indisputably this proceeding did not involve action by a hearing officer, but rather a reversal by ICC Division 1 of a prior determination by its Temporary Authority Board.[3]

Title 28 U.S.C. Section 1336 provides:

"*Interstate Commerce Commission's orders.* (a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

The Supreme Court stated in *Pennsylvania Railroad Company* v. *United States,* 363 U.S. 202 (1960):

"We decided some years ago while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. Rochester Tel. Corp. v. United States, 307 U.S. 125, 131, 132, 143, 83 L ed 1147, 1152, 1153, 1159, 59 S.Ct. 754."

And further:

"We have held that judicial review is equally available whether a Commission order relates to past or

[3] The disposition of an application by a Board does not constitute a hearing before a hearing officer. Compare Trans-American Freight Lines, Inc. v. U.S., 258 F. Supp. 910 (1966).

future rates, or whether its proceeding follows referral by a court or originates with the Commission. El Dorado Oil Works v. United Stattes, 328 U.S. 12, 90 L ed 1053, 66 S.Ct. 843."

In Inland Steel v. U.S., 306 U.S. 153 (1939), the Court stated:

"*Third.* The appellant takes the position that the Commission's purported postponement of its command to cease and desist (eighteen months after the interlocutory injunction was granted) deprived the court of authority to enforce the conditions of its interlocutory injunction. However, since the court had exercised jurisdiction to review and suspend the Commission's report and order, the administrative body was without power to act inconsistently with the Court's jurisdiction, had it attempted to do so. . . ."

Defendants do not dispute the fact that the ICC order of September 3, 1968 was a final grant of temporary authority to AFL to engage in operations thereunder, subject only to compliance with tariff requirements, and that the order was at that time reviewable by a three-judge court. Defendants have cited several cases[4] in support of their argument that the ICC retains "continuing jurisdiction over its orders at all times." However, none of the cases deals with the question now presented, i.e. whether, after a court has review jurisdiction of an ICC order and a stay of that order has been entered by the court, the ICC may nullify the review and the stay order by reopening

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[4] Aberdeen & Rockfish RR v. United States, 270 F. Supp. 695 (E.D. La. 1967), Affirmed as Modified 393 U.S. 87 (1968); Alamo Express, Inc. v. United States, 239 F. Supp. 694 (W.D. Tex. 1965), Affirmed 382 U.S. 19 (1965); Donaldson v. Read Magazine, 333 U.S. 178 (1948); United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 294 U.S. 499 (1935); Anchor Line Limited v. Federal Maritime Commission, 299 F. 2d 124 (Ct. of Appeals, D.C. 1962); Atchison, Topeko and Santa Fe Railroad Company v. United States, 231 F. Supp. 422 (N.D. Ill. E.D. 1964).

the ICC proceedings. The ICC itself has answered this question in Central Freight Lines, Inc. v. Strickland Transportation Lines, Inc., 102 M.C.C. 291.

> ". . . Moreover, when the Court has exercised jurisdiction to review and suspend a report and order of the Commission, we are without power to act inconsistently . . ."

Even if ICC had jurisdiction to reopen the ICC proceeding and to consider the Caputo verified statement, it would not meet the requirements of categories (8) and (9) of ICC Rule 49 C.F.R. 1131.2(c).

The Caputo verified statement fails to show any efforts by the Department of Defense to obtain from existing carriers the service AFL seeks to provide, or the identity of any existing carriers who failed or refused to provide the needed service and the reasons given for any such failure or refusal. Statement of these matters is mandatorily required by categories (8) and (9).

At best, the Caputo verified statement merely states the Department of Defense preference for the continuance of AFL's service and the expansion of that service into single-line service. AFL has been performing service for the Department of Defense under the provisions of 49 U.S.C. 303(b)(5), but no issue pertaining to that service is now before this court. The fact that the Department of Defense may desire a new or expanded type of service by a particular carrier does not justify the granting of temporary authority to provide such service without full compliance with all mandatory ICC rules.

While under 49 U.S.C. 310a(a) the ICC is vested with wide discretion to grant temporary authority for motor carrier services, it may only do so when both conditions specified in the statute are shown to exist, i.e. (1) "an immediate and urgent need" for service, (2) "within a territory having no carrier service capable of meeting such

need." It is clear from the language of the statute that in the absence of either one or both of the conditions specified, ICC "has neither power nor discretion to grant temporary authority applications . . . Variable and unpredictable enforcement of important and mandatorily stated rule provisions is inequitable in principle and unsound in practice." *Acme Cartage Co.* v. *U. S., supra,* at 456-457.

The court's Findings of Fact and Conclusions of Law are hereby found and held as stated in the foregoing Opinion.

For the reasons stated, we find that the granting of each Temporary Authority referred to in the foregoing Opinion was arbitrary, capricious and erroneous in law. Accordingly, each of the Temporary Authorities should be and hereby is held null and void. The stay order as to each Temporary Authority is continued in effect until further order of this court.

DATED this 26th day of March, 1969.

GILBERT H. JERTBERG
Gilbert H. Jertberg
United States Court of Appeals Judge

GEORGE H. BOLDT
George H. Boldt
United States District Court Judge

WILLIAM N. GOODWIN
William N. Goodwin
United States District Court Judge

Civil Action No. 3828

Judgment

This cause came on for trial on the merits before the undersigned judges as a three-judge court on January 24, 1969 and after the argument of counsel was submitted for decision. The court now having made and entered herein its Opinion, Findings of Fact and Conclusions of Law in writing, and being fully advised in the premises, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that each of the Temporary Authorities issued by the Interstate Commerce Commission to intervening defendant American Farm Lines on September 3, 1968 and December 19, 1968, respectively, be and the same hereby is held and adjudged null and void.

The stay order as to each of said Temporary Authorities is continued in effect until further order of this court.

DATED this 26th day of March, 1969.

GILBERT H. JERTBERG
Gilbert H. Jertberg
United States Court of Appeals Judge

GEORGE H. BOLDT
George H. Boldt
United States District Court Judge

WILLIAM N. GOODWIN
William N. Goodwin
United States District Judge

Affidavit of Vincent F. Caputo

My name is Vincent F. Caputo. I am employed by the Department of Defense (hereinafter "DOD") as the Director for Transportation and Warehousing Policy. I am the official responsible for, among other things, the efficient and economical operation of physical distribution activities for DOD. This affidavit is submitted in support of the application of American Farm Lines (hereinafter "AFL") for a stay of this Court's judgment of March 26, 1969 pending appeal from that judgment.

For reasons more fully set out below I believe that the Department of Defense and the American public generally will suffer irreparable loss pending the appeal in this case unless this Court stays its judgment of March 26, 1969 and permits the temporary operating authority awarded AFL by the Interstate Commerce Commission to take effect.

In discharging its responsibility for the conduct of the Nation's defense, DOD is required to move vast quantities of commodities between innumerable points and places within the United States and abroad. A substantial percentage of this traffic involves points in the States of Kentucky, Indiana, Illinois, Missouri, Louisiana, Arkansas, Texas, Kansas and Oklahoma, on the one hand, and points in Washington, California, Nevada and Utah, on the other —that is, the territories covered by the temporary authority awarded to AFL. Between August 1967 and June 1968, the last period for which statistics are currently available, DOD caused 978,516 net tons of freight to be transported between these territories. I have no reason to believe that the current DOD transportation requirements would be materially different. This traffic included numerous items in the definition of Class A and Class B explosives, including ammunition, bombs, and a variety of other ordnance items. A substantial part of this traffic is shipped under conditions requiring expedited delivery and thus must move over the most direct and quickest route.

DOD supported AFL's application for temporary authority because the service proposed by AFL was not available on a single-line, irregular route basis from motor carriers serving the territories covered by AFL's application.

Because of the limited nature of the authorities of existing carriers, DOD shipments in these territories ordinarily had to be carried on a joint-line, regular-route basis. Because of the necessity of piecing together separate authorities, traffic frequently was unable to move in a direct line between the origination points and the destination points. As a result, DOD was compelled to calculate transit time on the basis of 300 miles for every 24 hours. In contrast, when AFL began hauling for DOD on a direct lingle-line basis, transit times were cut by 67 percent. DOD calculates that it takes AFL only 8 hours to move the same traffic 300 miles.

The consequences of AFL's significantly shorter transit time have been enormous, both in terms of insuring the fastest possible delivery of critical war materials and in terms of effecting significant cost savings to the Government. Between December 1966 and the end of March 1969, the use of AFL has saved DOD in direct transportation costs alone $1,062,300. While figures are not available, I believe that this saving, itself substantial, is vastly overshadowed by the indirect systems savings—that is, such savings as warehousing and inventory costs—that direct single-line service makes possible.

Finally, there is the factor of safety. It is DOD's firm conviction that maximum use of direct single-line transportation of explosives and other hazardous materials is absolutely mandatory if the dangers to the public from the transportation of such items are to be kept to a minimum. The longer hazardous commodities are on the highway, the greater the exposure of risk to the public. We in DOD are doing everything possible to minimize hazards in the

transportation of explosives and other hazardous commodities, and I believe we are doing an excellent job in this respect. However, by the use of AFL's direct, single-line service, we could reduce the risk to the public even further through reduced mileages.

DOD is not alone in recognizing the extreme public importance of obtaining direct, single-line transportation of hazardous commodities. On August 12, 1968, the State of California petitioned the Interstate Commerce Commission to institute a proceeding for the purpose of adopting regulations to require common carriers of hazardous materials to transport such materials by the "nearest, direct route." The petition of the State of California, attached hereto as Appendix A, aptly describes the hazards of permitting such traffic to move in any other way. In recognition of the extreme desirability of obtaining such direct, single-line movement of hazardous traffic, the Department of Transportation has filed a statement in support of California's petition, and has also supported an application of Riss and Company, a leading carrier of explosives, in Docket No. MC-200 (Sub. 222), for permission to avoid circuitous routes. Copies of the Department of Transportation's statements are attached as Appendix B.

If this Court's judgment of March 26, 1969 is not stayed and AFL's temporary authority permitted to take effect, the Government and the public will suffer irreparable loss by the significant curtailment of AFL's service to DOD that will result. AFL's service to DOD has heretofore been provided to DOD by virtue of the exemption for farm cooperatives provided in section 203(b)(5) of the Interstate Commerce Act. However, as a result of the Interstate Commerce Commission's promulgation on May 21, 1969 of regulations implementing the 1968 legislation that limits the cooperative exemption, AFL's ability to haul for DOD will be substantially reduced. The new ICC regulations, which go into effect July 7, 1969, will prohibit AFL from carrying more than 15 percent of its total annual

interstate tonnage for non-members, including DOD. Accordingly, DOD believes that it is facing imminent deprivation of a significant volume of direct, single-line service which is now and has been available to it since December 1966. In the interest of conserving the taxpayers' dollars, which once spent cannot be recovered, in speeding up the line of supply, and in reducing safety hazards associated with the carriage of hazardous commodities, DOD believes it essential at least to maintain the status quo pending resolution by the Supreme Court of the issues raised by this Court's judgment of March 26, 1969. To require a temporary cessation of AFL's service during this interim period would reduce DOD's ability to achieve expedited delivery of critical materials, would substantially increase the cost to DOD and the taxpayers of moving defense traffic, and would deny the public the additional safety benefit of reduced on the road mileage of hazardous commodities.

Accordingly, DOD respectfully requests that the Court consider the foregoing information in passing upon AFL's motion for a stay pending appeal.

VINCENT F. CAPUTO
Vincent F. Caputo

Sworn to and subscribed before me this 5th day of June, 1969.

DAVID D. SUBGRAVE
Notary Public

My Commission Expires May 13, 1972

Affidavit

STATE OF WASHINGTON }
County of King } ss.

I, Forrest Arnold, being first duly sworn, depose on my oath and say:

I am Traffic Manager of Black Ball Freight Service, one of the Plaintiffs herein, and have personal knowledge of the following matters:

That I make this affidavit in opposition to a motion of American Farm Lines for an order to (1) stay judgment and (2) permit the temporary authority granted them to take effect, pending final disposition of the appeal from said judgment.

That for more than the past twenty-five years Black Ball Freight Service has participated in the transportation of general commodities including Class A and B explosives moving on Government bills of lading between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and on the other, points in Clallam, Jefferson, Kitsap and Mason Counties, Washington.

That my company has derived approximately 24 percent of its total revenue from interlining said traffic at Seattle or Tacoma, Washington. That during 1967 my company interlined in excess of 52,000,000 pounds of traffic moving between the above described points on Government bills of lading and in excess of 70,000,000 pounds in 1963. That our share of such traffic thus far in 1969 has been substantially diminished due primarily, we believe, to diversion to American Farm Lines. The flow of Government traffic has increased, but our share has substantially decreased.

That such traffic is necessary for the maintenance of my company's operations in that during 1967 our operating

ratio (percentage of total expenses to total revenue) was 94.8 percent. That our operating ratio in 1968 was about 93 percent but this far in 1969 exceeds 100 percent (a loss position).

That our participation in the subject traffic consists of being the delivering or originating carrier on traffic moving between points in Clallam, Jefferson, Kitsap and Mason Counties, Washington, and the States enumerated above, through interchange with other carriers at Seattle or Tacoma, Washington. The trailer equipment of the connecting carrier invariably moves through without physical transfer of the lading between the above-named Washington counties and the above-named States. Our participation in this service is, and has been, authorized by the certificate issued to us by the Interstate Commerce Commission in its Docket MC-7325 and Subs 3, 5, 6, 8 and 9 thereof.

That the stay of judgment which is sought herein would enable American Farm Lines to divert very substantial and increasing traffic from our company. I would estimate the diversion to reach not less than fifty percent of our participation in the subject traffic or not less than 12 percent of our total traffic. This is also because American Farm Lines under the authority would doubtless be a preferred carrier and in any event as an additional carrier would participate in the traffic. I say that it would doubtless be a preferred carrier, because its affidavits herein so state. I predicate my estimate in part upon the Exhibit H-2, placed in evidence by the Interstate Commerce Commission's Bureau of Enforcement in the Interstate Commerce Commission's MC-C 5835 American Farm Lines—Investigation of Operations and Practices, on June 3, 1969. I attach it hereto as my Appendix A. This exhibit reflects the vast increase in transportation by American Farm Lines of Government Traffic. During the six months of October 1, 1968 through March 31, 1969, the Government traffic transported by it increased from 9,000,000 pounds per month to 13,500,000 pounds per month. Also the

revenue figures show that American Farm Lines now receives approximately two-thirds of its revenue from the Government, and but one-third from the exempt cooperative status for which purpose it was created.

The loss of this very important traffic, in my opinion, will place our operations in a loss position and will cause irreparable injury to our company and to its service to the general shipping public contrary to the National Transportation Policy.

It is believed Black Ball Freight Service is the only general commodity carrier serving the entire Olympic Peninsula area (Clallam, Jefferson, Kitsap and Mason Counties) of the State of Washington—which area lies between Seattle and the Pacific Ocean, although we have numerous competitors serving parts of this area. Loss of this important traffic to American Farm Lines will impair our ability to serve this area on local as well as interline traffic.

It is contended that the existing carriers fail to effect delivery on time. In other words, unsatisfactory transit times are claimed. The facts are to the contrary. We have checked our records for a 12 months period and were unable to find a single instance where we failed to make delivery on time at Bangor, Washington (or any other point which we are authorized to serve) on the subject traffic. To the contrary, we find that very frequently the equipment arrives at Bangor but cannot be unloaded because the vessel on which the shipment is to be loaded is still at sea, or for other reasons of the receiving installation which reasons are beyond the control of the carrier. This is exemplified by "Appendix B" attached hereto and by this reference made a part hereof. This is a true copy of but a single sheet of a record regularly kept by us on a daily basis. The record covers all loads handled by our company and reflects the time when equipment was available for unloading at Bangor and the day on which it was actually unloaded.

This particular sheet covers 26 shipments for the four-day period shown. It reflects the following periods of detention (when the equipment was available for unloading but not unloaded by the Government):

Number of Days	*Number of Loads*
1	2
4	2
5	2
6	1
7	3
8	4
9	6
10	2
11	1
14	3

This adds up to 206 lost days on 26 loads or an average of 8 days per load. We estimate that for each lost day we incur approximately $10.00 per vehicle loss. Although the carriers' equipment was out of service, the Government (the Department of Defense) paid nothing for the lost time.

That our safety record through these many years has been a good one. Though we have handled hundreds of loads of ammunition each year for many years, a check of our records for the past five years discloses no reportable accidents involving Class A or B explosives. Additionally, when our Sub 9 was granted in February 1963 it carried, in keeping with current I.C.C. practice, an expiration date of February 1, 1968 as to Class A and B explosives. The expiration date has since been extended, without hearing, to February 1, 1973.

That we have reasonably met the transportation requirements of the Department of Defense with practically no complaints and to our knowledge no more than normally expected where the human element is concerned.

That while our tonnage of ammunition has steadily diminshed in this year of 1969, observation of our personnel indicates that American Farm Lines continues to move a very substantial volume into Bangor, even though they do not have the authority to do so.

That to properly handle explosives our line has, through recent years, expended a very considerable amount of time and money in acquiring and training personnel and in securing and maintaining equipment which would enable us to properly and adequately transport such traffic. That at the end of 1968 we had in excess of 15 drivers used in handling this traffic, some of which we have now lost due to loss of a very substantial part of the ammunition traffic. Beyond this, we estimate that we have invested approximately $200,000.00 in equipment in order to handle such traffic and we have been severely handicapped in the use of this investment through loss of the traffic, principally, we feel, to American Farm Lines.

Thus, it will be seen that in addition to the loss position in which our operations will be placed, our line will suffer irreparable loss in personnel and investment.

The foregoing is true to the best of my knowledge and belief.

FORREST ARNOLD
Forrest Arnold

STATE OF WASHINGTON }
County of King } ss.

The foregoing affidavit was subscribed and sworn to before me this 8th day of July, 1969.

MAKING
Notary Public for Washington

My Commission expires: 6/6/69

APPENDIX B

☐ BLACK BALL FREIGHT SERVICE ☐ BLACK BALL TRANSPORTATION, INC.

HIGHWAY MANIFEST

CARGO MANIFEST Range Pipe Line

	Shipment	Origin			Arrive at Destination	Date	Time Received	Time Delivered
1	2778 Rein 3436	Crane				11/1	1530	11/3	0800
2	2779 CFW29 1884	Fall Creek				11/2	0730	11/10	0900
3	2780 Pet 50-1219	Corpus Christi				11/2	0730	11/11	0910
4	2781 HB 70-179	Pelcrow				11/2	1330	11/7	1400
5	2782 CFW29 1876	Fall Creek				11/2	1230	11/12	1330
6	2783 CFW29 1640	"				11/2	1330	11/16	0915
7	2784 HB 70-307	Pelcrow				11/2	1700	11/13	1200
8	2785 Pet 50-1275	Corpus Christi				11/2	1635	11/10	2300
9	2786 TP 20-816	Ft Jackson Creek #2				11/2	1730	11/9	1100
10	2787 Pet 50-1104	Corpus Christi				11/2	pm	11/11	1015
11	2788 Rein 3223	Crane				11/2	2145	11/2	1440
12	2789 Pet 50-1326	Corpus Christi				11/2	2200	11/10	2315
13	2790 TP 20-30412	Ft Jackson Creek				11/2	2215	11/9	1630
14	2791 HMC 2647	Pelcrow				11/2	2200	11/7	0330
15	2792 Rein 3269	Crane				11/3	0400	11/12	1000
16	2793 Rein 3725	"				11/3	0400	11/12	1040
17	2794 Rein 3388	Ft Jackson Creek				11/3	0830	11/9	1300
18	2795 Rein 3341	Crane				11/3	1130	11/12	1445
19	2796 Rein 3465	"				11/3	1330	11/12	1220
20	2797 CFW 968-78	Mc Allister				11/3	1530	11/14	1520
21	2798 Pet 50-1435	Corpus Christi				11/3	1530	11/10	2120
22	2799 Pet 2739	Pelcrow				11/3	1730	11/7	2330
23	3000 Pet 46-45	"				11/3	1730	11/7	2330
24	3001 HMC 2735	"				11/3	2000	11/4	2300
25	3002 Rein 3632	Ft Jackson Creek				11/10	0330	11/12	1100
26	3003 Rein 3720	"				11/11	0330	11/14	1020
	TOTAL								

APPENDIX B

FORM 10 B/M

52,000,000 pounds of traffic moving between the above described points on Government bills of lading and in excess of [illegible] in 1968. That our share of such traffic thus far in 1969 has been

	Member	Non-Member	Government	Total
1966				
Tonnage	42,726,709	46,613,929		89,340,638
Revenue	$ 724,748.09	716,574.64		1,441,322.73
1967				
Tonnage	162,235,519	60,304,564	40,085,634	262,625,717
Revenue	$ 1,412,365.20	885,131.65	1,284,594.94	3,582,091.79
1968				
Tonnage	243,100,514	61,680,312	108,076,129	412,856,955
Revenue	$ 2,089,953.77	807,577.56	4,449,478.39	7,347,009.66
1st Six Months of 1969 Fiscal Year				
Tonnage	215,739,092	2,897,940	82,324,361	300,961,393
Revenue	$ 2,134,964.06	40,894.12	4,040,633.80	6,216,491.98

Computation obtained from IBM Run sheets.
Tonnage figures reflect pounds.
Computation based on American Farm Lines Fiscal Year commencing October 1.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

Civil Action No. 3828

BLACK BALL FREIGHT SERVICE, ET AL., *Plaintiffs and Intervening Plaintiffs*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *Defendants,*

AMERICAN FARM LINES, *Intervening Defendant*

State of Oregon }
County of Multnomah } ss

Affidavit

I, Edward V. Taylor, being first duly sworn, depose on my oath and say:

My name is Edward V. Taylor, and my business address is 1633 Northwest 21st Ave. (P. O. Box 3062), Portland, Oregon 97208. I am Director of the Western Traffic Service office of Consolidated Freightways Corporation of Delaware, hereinafter called CF, a plaintiff in this proceeding. I have been employed by CF for 11 years, 5 years as Traffic Manager and for the past 6 years in my present position. Among my duties is the responsibility for the preparation and presentation of evidence before the Interstate Commerce Commission and various state regulatory bodies. I am familiar with the issues involved in this proceeding, and have previously submitted an affidavit in it.

CF is a common carrier of general commodities under Certificate MC 42487 and subs thereto issued by the Interstate Commerce Commission. CF conducts very substantial operations between points in the States of Kentucky, Indiana, Illinois, Missouri, Arkansas, Texas, Kansas, and Oklahoma, on the one hand, and points in Washington, Cali-

AMERICAN FARM LINES
APPEND.

fornia, Nevada and Utah—the territorial scope of the American Farm Lines temporary authority application The only State involved in the American Farm Lines application not served by CF is Louisiana, and CF maintains interline arrangements over numerous gateways with other common carriers authorized to serve Louisiana.

CF, in the conduct of its general commodities operations, holds authority and performs direct route operations in the transportation of general commodities, including ordnance supplies, within the territorial scope of the American Farm Lines application. The Department of Defense regularly utilizes the service of CF in the movement of ordnance supplies and military impedimenta. In fact, during the period May 1, 1968 through April 30, 1969, the Department of Defense has utilized the services of CF to transport approximately 116,391 short tons of freight, including explosives, ordnance supplies, and military impedimenta. A substantial portion of that freight has been transported within the territorial scope of the American Farm Lines application.

CF has engaged in the transportation of Classes A and B explosives for more than thirty yars. In May, 1967, CF organized a special operating division, called the Arrowhad Division for internal purposes, for the specific purpose of transporting explosives, primarily for the government. The Arrowhead Division is specifically geared to the special circumstances relating to the loading, transportation, and unloading of explosives. The Arrowhead Division conducts a rigorous driver training program in the safe handling and transportation of explosives. The government has used the services of CF extensively in the transportation of explosives. For example, in the 5 month period, September 1, 1968 through February 28, 1969, the government routed via CF 1,099 loads of Classes A and B explosives, having origin and destination within the territorial scope of the American Farm Lines application. CF during the same period transported an additional 748 loads that could be interlined with American Farm Lines if the authority they seek is granted.

All of the above traffic was handled without accident or hazard to the public and, to our knowledge, none of the shipments failed to meet delivery dates specified by the government. None of the shipments reached destinations too late for transshipment with water vessels.

In recent months, there has been a substantial imbalance between available explosives traffic and equipment maintained to handle such traffic. For example, in April 1969, our Arrowhead Division transported 184 loads, of which 86 were within the territorial scope of the American Farm Lines application. During the same period of time, the Division had the equipment capability of transporting 1,047 loads. The reduction in the amount of available explosives traffic has been so great that our Arrowhead Division has recently discontinued long-term leases on 15 tractors previously dedicated to explosives transportation.

We have read the statement of Vincent F. Caputo, William R. Loney, and Max W. Young.

With regard to Mr. Caputo's statement, we, of course do not know the specific traffic with which the Department of Defense is favoring American Farm Lines. However, between key military installations, such as Doyline, Louisiana; Joliet, Illinois; McAlester, Oklahoma; Parsons, Kansas; and Defense, Texas, on the one hand and Bangor, Washington; Port Chicago, California; Herlong, California; and Hawthorne, Nevada, CF has handled all traffic tendered to it in the past year and has equipment capacity to handle at least four times as much traffic as it has recently been tendered.

While CF would prefer to handle such traffic over the shortest available routes for reasons of economy, shorter transit times, and less exposure to safety hazards, we know of no reason that traffic presently handled by American Farm Lines could not be handled within the time limits required by the Department of Defense, with a high degree

of safety. In this regard, we have an application pending before the Interstate Commerce Commission, in MC 42487, Sub 705, for permanent authority, supported by the Department of Defense. We seek to transport Classes A and B explosives between military installations in 41 states. The Department of Defense has not asked us to seek temporary authority for any portion of our permanent authority application. Neither has the Department of Defense requested us to seek temporary authority to obtain shorter routes between military installations that we regularly serve.

There is nothing unusual or demanding in the transportation of canned foodstuffs. Mr. Loney and Mr. Max W. Young fear that reduction in the availability of American Farm Lines srevice would require rail movement of the of California Canners and Growers and Tri-Valley Growers. There is no reason that canned goods cannot be moved by motor common carriers, including CF, in precisely the same quantities and same manner in which American Farm Lines performs service. Neither Mr. Loney nor Mr. Young has requested CF to perform transportation of canned foodstuffs.

EDWARD V. TAYLOR

Subscribed and sworn to before me
this 7th day of July, 1969

JEAN E. BLAND
Notary Public for Oregon

My Commisison expires April 1, 1973

Affidavit

STATE OF CALIFORNIA
COUNTY OF ALAMEDA } ss.

I, Earl J. Brooks, being duly sworn, depose on my oath and say:

I am Director of Commerce of Pacific Intermountain Express Co., one of the plaintiffs herein.

That I make this affidavit in support of a response to a motion by defendants for a stay of the effectiveness of the judgment entered herein by the Court March 26, 1969. The judgment stayed the taking effect of an order of the Interstate Commerce Commission served December 20, 1968 in Docket No. MC-129908 TA.

That for more than twenty-five years Pacific Intermountain Express Co., and its predecessors, have participated in the transportation of general commodities, including Classes A and B explosives, moving on Government bill of lading between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and on the other, points in Washington, California, Nevada, Utah and Arizona. That our company's participation in this traffic runs into millions of dollars per year. Such traffic accounts for a substantial portion of my company's gross revenue and ultimate net revenue and is necessary for the continuation of its present operations.

That for the full year 1968 my company participated in the transportation of 97,135 shipments destined to U. S. Government agencies both in direct single line and in interline service. It accomplished and collected on a total of 51,345 U. S. Government bills of lading covering shipments moving for the account of numerous agencies. These U. S. Agencies included, as examples, General Services Administration, Atomic Energy Commission, Post Office Department, Department of Interior, National Aeronautic and Space Administration, The Mint, Veterans Service Administration, Forest Service, Federal Penitentiaries, Social

Security, Geological Survey, Military Academies, Bureau of Reclamation, Internal Revenue Service, Bureau of Standards, Government Printing Office, Bureau of Mines, Department of Agriculture, Federal Aviation Agency, Bureau of Indian Affairs, Bureau of Immigration and Naturalization, Treasury Department, and the Department of Defense. A substantial portion of the total transportation has been related to military activities and directed by Department of Defense, the only agency supporting the application of American Farm Lines for temporary authority. This affiant would anticipate diversion of thousands of U. S. Government shipments to American Farm Lines, in addition to Department of Defense controlled shipments, that my company enjoys on a daily basis, in the event the authority involved herein is made effective. My company would thereby suffer irreparable injury.

For the purpose of determining the relative position my company has experienced in business from Department of Defense sources, a survey was made by this affiant on the movement of Classes A and B explosives westbound from and through Denver, Colorado, to military installations in California, Utah and Washington. The months January through May were used for the survey which will show a comparison of westbound traffic during each five month period in 1968 and in 1969. During the five month period in 1968 my company transported westbound 199 shipments constituting 708 loads for which it derived a revenue of $969,746.27. During a similar five-month period in 1969 it transported 85 shipments of 288 truckloads with a revenue of $478,674.70. This resulted in a revenue reduction of almost a half million dollars. The Class A and B explosives traffic which originated in the states where American Farm Lines has been most active, namely Illinois, Indiana, Louisiana, Missouri, Oklahoma, and Texas, decreased in the same five-month period from 114 shipments totalling 253 loads and a revenue to affiant's company of $286,358.31 to 3 shipments, making up 9 loads and $11,898.99 in revenues. In the 1968 five-month period my company participated in the movement of Classes A and B explosives loads west-

bound from Denver and originating in the above-named states as follows: McAlester, Oklahoma, 45 shipments, 149 loads; Doyline, Louisiana, 12 shipments, 46 loads; Defense, Texas, 12 shipments, 13 loads; Crane, Indiana, 26 shipments, 26 loads; Savanna, Illinois, 2 shipments, 2 loads; St. Louis, Mo., 2 shipments, 2 loads and Joliet, Illinois, 15 shipments, 15 loads. This totalled, as heretofore stated, 114 shipments for 253 loads. For the same period in 1969 and in the same territory my company received at Denver 3 shipments totalling 9 loads and only from one origin Joliet, Illinois. Affiant believes that his company has rendered a reasonably satisfactory service for the movement of general commodity shipments, including Classes A and B explosives, for the several U. S. Government agencies mentioned herein.

Affiant knows that the Department of Defense has diverted U. S. Government shipments from its service to that of American Farm Lines operating under a claimed exemption as a farm cooperative. In a competitive situation of several carriers, a carrier is not always certain as to which particular competitor provided the service on diverted traffic. However, in my opinion American Farm Lines has benefited from the diversion. Affiant wishes to make reference to Appendix A attached to the affidavit of Wayne S. Green for Garrett Freightlines, Inc. This is a reproduction of Exhibit H-2 in the Interstate Commerce Commission Docket No. MC-C-5835 which reflects the phenomenal growth of U. S. Government business handled by American Farm Lines at the expense of my company and other certificated common carriers. The Department of Defense apparently has designated American Farm Lines as its preferred carrier. The granting to American Farm Lines of temporary authority by the Interstate Commerce Commission, if allowed to stand, would open the gates for further diversion of U. S. Government traffic from my company, limited only to the extent of the applicant's ability to obtain leased independent operators to provide the service. American Farm Lines as a certificated common carrier apparently would abandon its claimed status as a farm

cooperative thereby enabling it to dedicate its entire efforts and its leased vehicles to transportation for all the numerous agencies and Departments of the United States Government. The diversion of U. S. Government shipments to American Farm Lines would thereby accelerate resulting in most serious irreparable injury to my company.

That Pacific Intermountain Express Co. is an authorized long existing motor carrier holding authority issued to it by the Interstate Commerce Commission in its Docket MC-730.

Pacific Intermountain Express Co. maintains terminals at, among other points, Chicago, Illinois; Indianapolis, Fort Wayne, Muncie and South Bend, Indiana; Kansas City and Wichita, Kansas; St. Louis, Missouri; Louisville, Kentucky; Houston, Texas; Fresno, Los Angeles, San Diego, Oakland, San Francisco, San Jose, Sacramento and Stockton, California; Las Vegas and Reno, Nevada; Denver, Colorado; Salt Lake City, Utah; and Spokane, Moses Lake, Wenatchee, Yakima, Pasco, Longview, Tacoma and Seattle, Washington. It has several million dollars invested in terminals and terminal properties, also local and line-haul vehicles, to assure the fulfillment of its common carrier obligation to the general public and to the United States Government. Each of these terminals is staffed with competent personnel, many requiring years of training with substantial investment by my company for such training. Our local and line drivers similarly are subjected to extensive and expensive training procedures particularly to assure proper handling and transportation of U. S. Government traffic, including Classes A and B explosives and bulk commodities in tank vehicles. Affiant has carefully checked the accident records and dangerous cargo damage records of my company for the years 1967, 1968 and year-to-date in 1969. Such examination reveals no reports of accidents, or damage to dangerous articles, including Classes A and B explosives, in connection with U. S. Government shipments during the two and one-half year period. Pacific Intermountain Express Co. has experienced a

satisfactory safety record over a period of many years. It has been given several first place awards nationally for an outstanding safety record. As an example, it received first place for the year 1968 for safe operations of vehicle fleets operating in excess of one hundred million miles per year awarded by American Trucking Association, Inc. Its continuing program of driver training, supervision, maintenance, and safe operation of its vehicles, is carefully designed to assure protection to the public, and to the cargo which it transports.

My company is ready, willing and able to provide additional transportation of all types of traffic, including shipments required to be moved by all the various Agencies and Department of the United States Government on government bills of lading. This of course includes that traffic controlled by the Department of Defense and required for military purposes. It further is ready, willing and able to provide transportation for California Canners and Growers and for Tri-Valley Growers to the extent authorized. The great bulk of grain shipments made by Farmers Grain Cooperative, Ogden, Utah is to Imperial Valley in California. It is not clear to this affiant as to what extent such transportation could or would relate to non-member transportation presently engaged in or contemplated by Defendant, American Farm Lines.

Unless the effectiveness of the judgment herein is allowed to continue in effect my company will suffer irreparable damage from the loss of needed revenues.

EARL J. BROOKS
Earl J. Brooks

Subscribed and sworn to before me this 9th day of July, 1969.

PATRICIA C. YORK
Notary Public for California

PATRICIA C. YORK
My Commission Expires
Feb. 20, 1970

No. 369—October Term, 1969

AMERICAN FARM LINES, *Appellant*,

v.

BLACK BALL FREIGHT SERVICE, ET AL., *Appellees*

Motion for Stay

MR. JUSTICE DOUGLAS, Circuit Justice.

It appearing that the jurisdictional statement filed by appellant presents substantial questions, it is ordered that the final judgment entered by the District Court in this case and the District Court's order of January 6, 1969 staying the effectiveness of the ICC's order of December 19, 1968, be stayed pending disposition of the jurisdictional statement by the Supreme Court.

August 21, 1969

Supreme Court of the United States

No. 369 ---- , *October Term, 19* 69

American Farm Lines,

Appellant,

v.

Black Ball Freight Service, et al.

APPEAL from the United States District Court for the Western District of Washington.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is consolidated with No. 382 and a total of one hour is allotted for oral argument.

October 27, 1969

FILE COPY

FILED

JUL 22 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, ET AL.,* *Appellees*

On Appeal From the United States District Court for the Western District of Washington

JURISDICTIONAL STATEMENT

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July 22, 1969

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(List of appellees continued)

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; D-C INTERNATIONAL, INC.; GARRETT FREIGHTLINES, INC.; NAVAJO FREIGHTLINES, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; WESTERN GILLETTE, INC.; RISS & COMPANY, INC.; IML FREIGHT, INC.; and AMERICAN TRUCKING ASSOCIATIONS, INC.; YELLOW FREIGHT SERVICE; T.I.M.E. FREIGHT, INC.; TRANSCON LINES, INC.; CONSOLIDATED COPPERSTATE LINES; TRI-STATE MOTOR TRANSIT CO.; UNITED TRANSPORTS, INC.; BRASWELL MOTOR LINES, INC.; CENTRAL FREIGHT LINES, INC.; CENTRAL EXPRESS, INC.; RED ARROW FREIGHT LINES; BROWN EXPRESS, INC.; ALAMO EXPRESS, INC.; J. H. ROSE TRUCK LINE, INC.; J. J. WILLIS TRUCKING CO.; J. V. HARRISON TRUCK LINES, INC.; MILLER TRUCK LINE, INC.; H. S. ANDERSON TRUCKING CO.; CENTRAL FORWARDING, INC.; ROBERTSON TANK LINES, INC.; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE COLORADO AND SOUTHERN RAILWAY COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; ELGIN, JOLIET AND EASTERN RAILWAY COMPANY; FORT DODGE, DES MOINES AND SOUTHERN RAILWAY COMPANY; FORT WORTH AND DENVER RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; GREEN BAY AND WESTERN RAILROAD COMPANY; GULF MOBILE AND OHIO RAILROAD COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; ILLINOIS TERMINAL RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD; MISSOURI PACIFIC RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY; UNION PACIFIC RAILROAD AND WATERLOO RAILROAD; and THE UNITED STATES OF AMERICA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

AMERICAN FARM LINES, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, ET AL., *Appellees*

On Appeal From the United States District Court for the Western District of Washington

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JURISDICTIONAL STATEMENT

Appellant American Farm Lines ("AFL") appeals from the judgment of the United States District Court for the Western District of Washington, entered March 26, 1969, nullifying certain orders of the Interstate Commerce Commission granting AFL temporary authority as a common carrier to haul general commodities for the United States Government between nine mid- and southwestern states and five western states. This Statement is submitted to show that this Court has jurisdiction over the appeal, and that the questions presented are substantial and deserving of plenary consideration.

OPINION BELOW

The opinion of the court below, issued on March 26, 1969, appears at Appendix A hereto.[1] The judgment of the court below from which this appeal is taken appears at Appendix B. The orders of the Interstate Commerce Commission that were the subject of the judicial review proceeding brought in the court below appear at Appendixes C and E.

JURISDICTION

This is an action brought by appellees under 28 U.S.C. §§ 1336 and 2321-25 to set aside orders of the Interstate Commerce Commission issued on September 3, 1968 and December 19, 1968. By these orders the Commission granted appellant AFL temporary authority to carry Government freight as a regulated motor common carrier. A hearing was held before a three-judge district court, and on March 26, 1969 that court entered its judgment setting aside the orders of the Commission. A notice of appeal was filed by AFL in the district court on May 23, 1969. The jurisdiction of this Court to review the final judgment of the district court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Cases sustaining this Court's jurisdiction on appeal from decisions of three-judge district courts reviewing orders of the Interstate Commerce Commission include *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S.F.R. Co.*, 387 U.S. 397 (1967); *United States* v. *Drum*, 368 U.S. 370 (1962), and *American Trucking Ass'ns, Inc.* v. *United States*, 364 U.S. 1 (1960).

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[1] The lower court's opinion is reported at 298 F. Supp. 1006.

STATUTE INVOLVED

Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. § 310a(a), provides in relevant part as follows:

> (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier . . . by motor vehicle . . . .

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the district court failed to apply the proper scope of judicial review in nullifying temporary authority orders of the Interstate Commerce Commission solely because the Defense Department statement supporting the application did not comply with supposedly "mandatory" procedural rules of the ICC, when the record as a whole contained evidence to support the Commission's order?

2. Whether the Interstate Commerce Commission had jurisdiction to reopen a temporary authority application proceeding, in order to receive additional evidence, at a time when petitions for reconsideration were pending before the Commission and when that proceeding was the subject of a judicial review action in a district court?

STATEMENT OF THE CASE

American Farm Lines ("AFL") is a federation of agricultural marketing cooperatives, and is itself an agricultural cooperative, formed in 1964 for the purpose of providing motor transportation services to its members. AFL's 16 member cooperatives engage in

the processing and marketing of the products grown by their own members.[2]

As a cooperative and federation of cooperatives AFL was not at the time of its formation, and is not now, required by law to possess a certificate of public convenience and necessity from the Interstate Commerce Commission in order to transport freight for its members. Section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(5), prior to its amendment in 1968, exempted from the certification provisions of that Act

> motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined . . . .[3]

This exemption was construed in 1965 to permit an agricultural cooperative engaged in motor transportation to carry freight for nonmembers to the extent that such nonmember transportation is "incidental and necessary" to the cooperative's primary transportation

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[2] The principal facilities of AFL's members are located in Washington, Oregon, Northern California, Utah, Nebraska, Missouri, Texas, New Mexico, Wisconsin, Maryland, Illinois and Massachusetts.

[3] Section 15(a) of the Agricultural Marketing Act of 1929, 12 U.S.C. § 1141j, defines the term "cooperative association" as follows:

> As used in this act, the term "cooperative association" means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services. *Provided, however,* That such associations are operated for the mutual benefit of

activities. *Northwest Agricultural Cooperative Ass'n* v. *Interstate Commerce Commission*, 350 F. 2d 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). AFL's nationwide service to its members has always necessitated that it perform sufficient nonmember transportation to insure that vehicles can be made available to members, when and as needed, and that members' products can be transported on an economically feasible basis. In December 1966, under the authority of its exemption, AFL began to haul freight for the Department of Defense to meet urgent defense needs.[4]

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the members thereof as such producers or purchasers and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

[4] It was at this time that the Secretary of Defense adopted a policy of using farm cooperative transportation "because of our responsibility to obtain effective transportation of military supplies at the lowest overall cost to the Government and the taxpayer," and to encourage competition in the provision of transportation services to the Department. *Hearings on Agricultural Cooperative Transportation Exemption Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 90th Cong., 1st Sess. 155 (1967) (testimony of Defense Department witness). The Department's 1968 Directive requiring Defense agencies to select that means of transportation providing the lowest over-all cost is quoted at page 13, *infra*.

During 1967 AFL's ability to carry a sufficient level of nonmember freight to support its service to its members was threatened in two respects: First, legislation was introduced in Congress that would have substantially limited the scope of the exemption provided to cooperatives under section 203(b)(5);[5] and, second, a group of common carriers of munitions filed suit against AFL in the United States District Court for the Western District of Oklahoma under section 222(b)(2) of the Interstate Commerce Act, 49 U.S.C. § 322(b)(2),[6] seeking to impose severe limitations on AFL's ability to carry freight—particularly explosives—for the United States Government. *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* Civ. No. 67-487, W.D. Okla. On February 20, 1968 an injunction was entered in this case prohibiting AFL from performing "back-to-back" movements—that is, two consecutive movements—for the United States Government.[7]

In July 1968 Congress enacted the legislation that had been introduced during 1967 to narrow the scope

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[5] S. 752, 90th Cong., 1st Sess. (1967). S. 752, as originally introduced, would have made the exemption available only when the nonmember transportation involved "farm products, farm supplies, or other farm-related traffic."

[6] Section 222(b)(2) authorizes suit by a private party alleging injury by reason of claimed violations of the Interstate Commerce Act or the regulations thereunder.

[7] On May 28, 1968 the same district court, in a companion case, *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* Civ. No. 68-148, W.D. Okla., enjoined AFL from carrying nonmember freight except when proceeding to pick up or when returning from delivery of a member shipment, and then only when necessary to prevent proceeding with an empty vehicle. AFL's appeals in these cases are presently pending before the United States Court of Appeals for the Tenth Circuit.

of the agricultural cooperative exemption in section 203(b)(5) of the Interstate Commerce Act. Public Law 90-433, 82 Stat. 448. The amendment, which imposed for the first time a quantitative limit on nonmember transportation by cooperatives, provided that a cooperative could not, in any fiscal year, provide interstate transportation for hire to nonmembers in excess of 15 per cent of the cooperative's total interstate tonnage. In addition, for the first time, it defined "nonmember" service to include service to the United States Government.[8]

In order to preserve an ability to carry nonmember freight within the limits of the law, and particularly in order to continue to serve the Defense Department, AFL filed applications with the Interstate Commerce Commission in May and July, 1968, respectively, for temporary and permanent authority to carry freight for the United States Government as a regulated common carrier between nine mid- and southwestern states and five western states. These applications are both vigorously supported by the Defense Department.

Under section 210a of the Interstate Commerce Act, the ICC may grant temporary operating authority when there is shown to be an immediate and urgent need for the proposed service and there are no other carriers capable of meeting such need. Under ICC

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[8] Under section 15(a) of the Agricultural Marketing Act of 1929, 12 U.S.C. 1141j, which provided the definition of "cooperative" that had been adopted by reference in section 203(b)(5) of the Interstate Commerce Act, it was expressly provided that

> all business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

regulations a temporary authority application must be accompanied by a supporting statement from the shipper requiring the service. 49 C.F.R. 1131.2(c). In accord with these regulations, AFL's application was accompanied by a letter from the Department of Defense, dated May 15, 1968, urging that the application be granted. The Defense Department statement pointed out, in part, that recent court actions had resulted in severely restrictive interpretations of AFL's exception, and that AFL's ability to continue to provide necessary service to the Department was thereby substantially limited.

Protests to AFL's application were filed by some 125 motor and rail carriers, and on September 3, 1968 the ICC granted AFL's application for temporary authority. The order of the ICC granting the authority is reproduced in Appendix C. Petitions for reconsideration of the Commission's decision were filed by more than 20 of the protesting carriers, and on September 26, 1968, notwithstanding the fact that the pending petitions for reconsideration had not been acted upon, a number of the protesting carriers [9] filed suit in the court below, to set aside and annul the ICC's order of September 3, 1968. The complaint alleged that the supporting statement from the Department of Defense failed to comply with the ICC regulations prescribing the form and content of supporting shipper statements.[10] On October 2, 1968 the court entered an order

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[9] Eight of the ten original plaintiffs in this action had petitions for reconsideration pending before the ICC at the time they filed the complaint.

[10] The Commission's regulations, 49 C.F.R. § 1131.2(c) provide as follows with respect to such supporting statements:

(c) *Supporting statements.* Each application for temporary authority must be accompanied by a supporting statement(s)

designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense, must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

staying *pendente lite* the effectiveness of the ICC order of September 3.

On October 16 and 18, 1968, the Defense Department and AFL responded to the petitions for reconsideration pending before the ICC. On November 5, 1968, the Commission, on its own motion, ordered the proceedings reopened to receive verified statements from both the applicant and the protestants.[11] (The Commission's order is reproduced at Appendix F hereto.) On November 20, 1968 the Defense Department filed the sworn statement of Mr. Vincent F. Caputo, its Director for Transportation and Warehousing Policy, the highest-ranking transportation official in the Department. (This statement is reproduced in Appendix D hereto.) The 22-page Defense Department statement pointed out that between August 1, 1967 and June 30, 1968 the Department had required transportation for more than 1.9 billion pounds of freight between the points AFL sought to serve as a common carrier (App. D, p. 21a), and that between December 1966 and June 30, 1968, AFL itself, under its exemption as a cooperative, had transported approximately 74 million pounds of freight for the Department. (App. D, p. 31a) The

[11] The Commission's order conferred substantial benefits on the protestants. It noted that numerous protestants had filed petitions for reconsideration of the order of September 3, 1968 and that the Defense Department's reply to these petitions had set forth additional reasons for granting the application, to which protestants had no opportunity to reply. Accordingly, the Commission directed that the Defense Department's verified statement "specify the commodities and points between which there is an immediate and urgent need for applicant's service which cannot be met by existing carriers." It then gave protestants a period in which to file responsive statements, after which the proceeding was to be "reconsidered by us on the record as made together with such verified statements as may be filed." (App. F, p. 41a)

statement also pointed out that the Department's need for delivery of freight "in the most expeditious manner possible" had not been filled by the existing common carriers, principally for three reasons:

> 1. Most existing service is available only on a "joint-line" basis, in many cases requiring participation by at least three carriers. In the Department's experience this requirement of interlining generally tripled transit times over those achieved with the direct, single-line service of AFL. (App. D, pp. 22a-23a)
>
> 2. Virtually all existing carriers authorized to provide service in the territories AFL proposed to serve are "regular route" carriers, who must follow prescribed highway routings set forth in their certificates. Thus, even where single-line service is available from an existing carrier between specific points, the carrier is required to operate over greater distances than would be required under an "irregular route" certificate such as that sought by AFL. (App. D., p. 23a.)
>
> 3. The pattern of operation of some existing single-line carriers was such that in transporting a given shipment delays were incurred at relay terminals for the switching of drivers and power units. AFL, by contrast, operates with two-man driver teams and without equipment changes, thus avoiding such delays. (App. D, p. 23a.)

The Defense statement commented that the Government was being forced to rely on a transportation system "largely comprised of carriers holding 'bits and

pieces' of authority"; [12] that expedited service was thus precluded; and that this inherently inefficient system has prevented establishment of the most economical distribution system possible. (App. D, p. 25a.) The statement set forth a great number of examples of expedited deliveries that had been effected by AFL in situations where no existing common carrier could provide comparable service. (App. D., pp. 31a-33a) It also set forth detailed examples of military origin and destination points in the territories covered by AFL's application between which there was no carrier authorized to perform single-line service for commodities shipped by the Department. (App. D., pp. 25a-27a)[13]

Finally, the Department indicated that the immediacy and urgency of its need for AFL's service as a certificated common carrier, requiring the issuance of temporary authority, was caused by the injunctions that had been entered against AFL, which had precluded AFL from rendering much of the service it had theretofore provided, and the recently enacted amendment to section 203(b)(5) of the Interstate Commerce Act, which threatened to "limit even more drastically" AFL's ability to serve the Department in

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[12] Following the Commission's decision in this case the Defense Department received over 100 requests from competing carriers to support them in similar efforts to obtain direct, point-to-point authority such as that granted AFL. It thus appears that AFL's action may have the effect of stimulating a substantial upgrading of the nation's motor transportation system.

[13] In an affidavit submitted in support of AFL's motion for a stay of the judgment below, the Defense Department also pointed out that AFL's direct, single-line transportation of hazardous commodities, such as explosives, involves shorter transit times and less handling of the freight, and thus reduces exposure to the dangers that are inherent in transporting such commodities.

the future. (App. D, p. 33a)[14] Significantly, the Defense Department statement was submitted only a short time after the promulgation of a major Defense directive on transportation policy, which requires all components of the Department to select that means of transportation "which will meet DOD requirements satisfactorily at the lowest overall cost from the origin to the final known destination". Dept. of Defense Directive No. 4500.9, par. IV(C)(1) (Sept. 27, 1968). This Directive emphasized the need for expedited service, such as that performed by AFL, by requiring that consideration be given to the extent to which expedited movement will contribute to economies through reductions in indirect costs. *Ibid.*

Statements in response to the Defense Department statement were filed by protestants in December, and on December 19, 1968 the Commission entered an order again granting AFL's application. The Commission's order, which is reproduced in Appendix E hereto, held that the record before the Commission established as follows with respect to the needs of the Department of Defense (App. E, p. 36a):

> (1) That, in discharging its responsibility for the conduct of the Nation's defense, it imperatively requires service over the most direct routes in a minimum transit time to effect movement of a vast quantity of numerous commodities between innumerable points and places within the United States and abroad;
>
> (2) That it has experienced inefficient and circuitous joint-line transportation by the use of existing carrier services which have been deficient

[14] The ICC hearing on AFL's permanent application began in June 1969, and is presently in recess until October 1969. Final disposition of that application is at least three years away.

for its needs, particularly relating to the coordination of the arrival of inbound shipments with the production schedules of manufacturing installations and the departure times and transhipment dates of matters and materials necessary to the national defense;

(3) That it has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs;

(4) That there is nothing in this record to establish that any of the protesting carriers provide a service to meet its needs;

(5) That unless applicant is granted the temporary authority sought herein, the Department of Defense will be without an expedited and flexible service for which it has an immediate and urgent need necessary to the defense of the country; and

(6) That, in balancing the scales of public interest, it is necessary to assure that the Government's immediate and urgent transportation requirement be met by an expedited and flexible service which will be used to complement rather than replace existing services.

A supplemental complaint was filed in the court below on December 31, 1968, alleging in substance that the new Defense Department statement still failed to comply with the Commission's regulations. An order staying the effectiveness of the Commission's order of December 19, 1968, was entered by the court below on January 6, 1969. The case was subsequently briefed and argued on the merits and on March 26, 1969 the lower court entered its judgment holding the ICC temporary authority orders of September 3 and December 19, 1968 null and void.

The court held that the Defense Department statement of May 15, 1968 did not comply with the ICC regulations because it failed to provide the two categories of information called for by subsections (8) and (9) of 49 C.F.R. 1131.2(c), namely:

> (8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> (9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

In the court's view a response to subsections (8) and (9) was absolutely mandatory, and the ICC was without authority to waive any failure to respond. The court further held that notwithstanding the pendency of petitions for reconsideration before the ICC—which it found to be unauthorized under ICC rules [15]—the

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[15] The court below was clearly in error in holding that the petitions for reconsideration were unauthorized. AFL's application had originally been denied by the ICC's Temporary Authorities Board, a board of employees. AFL then filed a petition for reconsideration. Division 1 of the Commission, acting as an appellate division, thereupon reversed the Temporary Authorities Board. Rule 101(g) of the ICC's General Rules of Practice, 49 C.F.R. 1100.101(g), expressly provides for the filing of petitions for reconsideration of the Division action under these circumstances:

> (g) *Petitions for reconsideration of appellate division decisions on review of board decisions.* . . . If in the consideration of [a petition seeking reversal of a determination by a board of employees], by the appellate division, the previous determination of the board has been reversed, . . . *a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate* division . . . . [Emphasis added.]

ICC lost jurisdiction to reopen the record once the judicial review proceeding was filed. But even if the Commission had such jurisdiction, the court held, the new statement submitted on behalf of the Defense Department in November failed to provide the information called for by subsections (8) and (9). Accordingly, the court nullified both the September 3 and December 19 orders of the ICC.

THE QUESTIONS ARE SUBSTANTIAL

The practical effect of the judgment of the court below is not only to frustrate AFL's efforts to continue to provide lawful service to nonmembers by becoming a regulated common carrier, but is also to deprive the Department of Defense of a superior transportation service, immediately and urgently needed by it, the efficiency and economy of which are simply not available from other carriers.[16] Beyond these practical considerations, however, the judgment gives rise to substantial questions of administrative law, is in conflict with decisions in other districts, and, unless reversed, threatens wholly unwarranted interference with the Interstate Commerce Commission's administration of section 210a of the Interstate Commerce Act.[17]

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[16] In an affidavit submitted in the court below in support of AFL's motion for a stay of the judgment, the Defense Department pointed out that between December 1966 and March 1969 it had saved $1,062,300 in direct transportation costs by using AFL over the next lowest cost carrier. It also pointed out that the additional indirect savings in warehousing and inventory costs vastly overshadowed this figure (Affidavit of Vincent F. Caputo, Director of Transportation and Warehousing Policy, Department of Defense, p. 3).

[17] The extent of interference with the Commission's administration of section 210a can be judged from the following figures showing the constantly increasing number of actions by the ICC on temporary authority applications, as recently reported by the ICC

Under section 210a the ICC is granted broad discretion to grant an application for temporary authority, without hearing or other prescribed procedures, when two conditions are found by it to exist: (1) there must be an immediate and urgent need for the service, and (2) the territory within which the service is proposed must have no carrier service capable of meeting such need. The court below did not dispute the Commission's finding that the Department of Defense had an immediate and urgent need for the service proposed by AFL.[18] Nor did the court consider whether the record before the ICC, taken as a whole, contained evidence supporting the ICC's finding that there was no available carrier service capable of meeting this need. The court simply limited judicial review to a strict parsing of the Defense Department's supporting statement. It held that solely because that statement failed to indicate whether the Department had made

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to the Subcommittee on Surface Transportation of the Senate Commerce Committee:

Applications for Motor Carrier Temporary Authority Under Section 210a

Fiscal Year	Receipts	Dispositions
1964	4877	4901
1965	5415	5393
1966	5327	5370
1967	5706	5685
1968	6382	6399

ICC, *Report of Basic Policy Matters Under Consideration By the Interstate Commerce Commission*, app. D, Table 2 (1969).

[18] The court's decision was based solely upon a failure to comply with the supposedly "mandatory" requirements of subsections (8) and (9) of 49 C.F.R. § 1131.2(c). These subsections only call for information relating to the shipper's efforts to secure the desired service from other carriers, and not to the immediacy and urgency of the need.

efforts to obtain the service from other carriers, the Commission's grants of temporary authority must be set aside. It thus ignored the Department's statements that it knew of no other carriers able to provide the kind of service for which AFL was seeking authority, and in effect, required the Department to perform a useless act—to ask for service it knew could not be furnished.

On this appeal appellant will demonstrate that the Defense Department statement clearly provided the information called for by subsections (8) and (9). Even if it failed to comply literally with these sections, the statement reasonably showed that no other carrier was capable of performing the kind of service that AFL was performing for the United States Government. Moreover, had the court reviewed the ICC's decision on the basis of the *entire* record before the Commission, as it was required to do, it would have been clear from the evidence submitted by the protestants themselves that no other carriers were authorized to perform the service performed by AFL.

A. The Lower Court Failed To Apply the Proper Scope of Review

It is the well-established rule that a reviewing court must look to the entire record before the Commission to determine whether it acted arbitrarily in granting temporary authority under section 210a. *Bowen Transports, Inc.* v. *United States,* 116 F. Supp. 115, 120 (E.D. Ill. 1953) The Commission decision must be sustained if there is

> any evidence in the administrative record which tends to show that the temporary authority provides a service "for which there is an immediate

> and urgent need to a point or points or within a territory having no carrier service capable of meeting such need. . . ."

Roadway Express, Inc. v. *United States,* 263 F. Supp. 154, 157 (N.D. Ohio 1966). See also *Hussey* v. *United States,* 271 F. Supp. 650 (N.D. Cal. 1965); *Merchants Delivery Co.* v. *United States,* 265 F. Supp. 669 (W.D. Mo. 1967); *Union Cartage Co.* v. *United States,* 244 F. Supp. 1005 (D. Mass. 1965).

Moreover, the Commission itself is not limited to a consideration of the evidence submitted by the applicant. It may also take into account the statements filed with it by protesting carriers. If such statements themselves disclose that there are no other carriers capable of providing transportation comparable to that proposed in the application, the Commission's findings on this statutory criterion must be upheld. *Estes Express Lines* v. *United States,* 292 F. Supp. 842, 844 (E.D. Va. 1968), *aff'd per curiam,* 394 U.S. 718 (April 21, 1969).

In the instant case the Commission expressly found (App. E, p. 36a) not only that the Defense Department

> has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs;

but also that

> there is nothing in this record to establish that any of the protesting carriers provide a service to meet its needs.

In reviewing the Commission's action, however, the court below flatly refused to consider any portion of the record other than the Defense Department state-

ment. Its refusal was based upon its conclusion that the ICC regulations prescribing the content of such statements, 49 C.F.R. §§ 1131.2(c)(8) and (9), were "mandatory", that the Defense Department statement failed to comply with these requirements, and that action based upon such a defective statement was automatically invalid.

The court's exceedingly strict and technical reading of the ICC regulations failed to take account, however, of the purpose of these regulations.[19] These rules simply set forth a method of presenting facts to the Commission. They were adopted in 1965, in the face of an ever-increasing number of temporary authority applications, because the Commission found that many such applications failed to present the information necessary for the Commission to make its statutory findings. Under such circumstances the Commission found it difficult in some cases "to reach an informed and equitable decision." See *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453, 456 n.4 (W.D. Wash. 1968) (quoting ICC policy statement). If a support-

[19] It is clear that such cases as *Service* v. *Dulles*, 354 U.S. 363 (1957), and *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), are completely inapposite here. Those cases prohibited governmental agencies from depriving individuals of substantial rights without observing procedural safeguards established by the agency for the adjudication of such rights. In each case the agency's failure to observe the safeguards substantially prejudiced the individual whom they were intended to protect. In the instant case the regulations simply prescribe the format of the evidence to be presented to the ICC, and are intended only to facilitate the ICC's consideration of temporary authority applications. They were plainly not intended to confer rights upon competing carriers. Moreover, the ICC's departure from these regulations could not conceivably prejudice competing carriers, who have ample opportunity to submit their own evidence, and to secure judicial review based upon the entire record.

ing statement reasonably presents facts upon which the Commission may act, despite the lack of a literal response to each category of required information, or if such facts appear in the record as a whole, a fair and equitable decision is clearly possible. The purpose of the regulation is thus served, and as long as the ICC's order is reviewable on the basis of the entire record made before the Commission, there is no danger of an improvident grant of authority and there can be no conceivable prejudice to any of the parties.

Significantly, other district courts presented with the argument that these regulations are "mandatory" have taken a contrary position to that adopted by the court below. The argument was flatly rejected, in *Roadway Express, Inc.* v. *United States,* 263 F. Supp. 154, 157 (N.D. Ohio 1966) ("rules reflect no intention to reduce or relinquish [ICC's] statutory discretionary power to issue certificates of temporary authority"), and again recently in *Superior Trucking Co.* v. *United States,* 1969 CCH Fed. Car. Cas. ¶ 82108, N.D. Ga., June 4, 1969, where the court stated (*Id.* at 54544)

> The regulations were designed to facilitate the Commission's findings of an urgent and unmet need; if facts supporting these findings exist in the record, the fact that the regulations were not strictly followed should be irrelevant. It is particularly inappropriate to strictly bind an agency to regulations made under a statute designed to encourage summary procedures. The Commission's regulations should not be read to impose more rigid standards on the grant of a temporary authority than the summary procedures envisioned by [section 210a of the Interstate Commerce Act].

The court in *Superior* noted that literal compliance with subsections (8) and (9) of 49 C.F.R. § 1131.2(c)

would impose substantial record-keeping burdens on shippers. It also pointed out that if the result of a failure to respond to these items was to "void a proceeding *ipso facto* [it] would be to effectively eliminate temporary authorities." *Id.* at 54544.

It is thus clear that by invalidating the ICC's orders solely on the basis of a failure to comply literally with supposedly "mandatory" rules, and in failing to determine whether the record as a whole contained evidence to support the Commission's orders, the court below departed radically from the settled rules of judicial review of such orders. It is also clear, and will be demonstrated in detail upon this appeal, that the record before the ICC contained more than ample evidence to support the Commission's orders.[20]

B. The Court Below Erroneously Held That the ICC Lacked Jurisdiction To Reopen the Administrative Record

In *Atchison, T. & S.F.R. Co.* v. *United States,* 231 F. Supp. 422 (N.D. Ill. 1964) the Commission's right to reopen its proceedings without leave of court, during the pendency of a judicial review action, was expressly upheld. The court held that the reopening was not in and of itself sufficient reason to void the Commission order. The court also pointed out—as is clearly the case here—that the plaintiffs had not been prejudiced by the reopening. A substantially similar result was reached in *Anchor Line Ltd.* v. *Federal Maritime Commission,* 299 F. 2d 124 (D.C. Cir. 1962).

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[20] The rule is clearly established that the "substantial evidence" test need not be met on review of such orders. *See Merchants Delivery Co.* v. *United States,* 265 F. Supp. 669 (W.D. Mo. 1967). As stated in *Roadway Express,* quoted at page 18, *supra,* the ICC must be upheld if there is *any* evidence in the record to support it.

Precisely the same situation was presented in the instant case. In preliminary proceedings in the court below it was argued that the original Defense Department statement was defective. Well prior to the presentation of the case on the merits to the lower court, and at a time when 8 of the original 10 plaintiffs themselves had petitions for reconsideration pending before the ICC, the Commission reopened the record to permit correction of the presumed omission. This was clearly an appropriate and efficient means of advancing final disposition of the case. Because the case had not been presented on the merits to the reviewing court, and was in fact still pending before the ICC by reason of plaintiffs' own petitions for reconsideration, the court was not inconvenienced or caused to expend judicial time needlessly. In addition plaintiffs could not conceivably have been prejudiced by the reopening. After reopening, all of the plaintiffs had ample opportunity to participate fully in the reopened proceeding, and in fact a number of them did submit sworn evidence.

Moreover, because the very nature of a temporary authority application—based as it is upon an immediate and urgent need—weighs heavily in favor of a prompt final disposition, there is ample justification for such reopening of the record. If there are defects that are easily correctable it clearly serves the purposes of section 210a to permit those defects to be remedied forthwith, without requiring fruitless completion of the review proceeding and commencement *de novo* of the administrative proceeding. *Cf. Evans* v. *Federal Communications Commission*, 113 F. 2d 166 (D.C. Cir. 1940). To prohibit reopening would be contrary to the statutory policy of promoting prompt disposition of agency's business, and would simply prolong the time

in which errors might otherwise be corrected. "The loser before the Commission has no vested right that the Commission's errors be preserved pending appeal." *Wrather-Alvarez Broadcasting, Inc.* v. *Federal Communications Commission*, 248 F. 2d 646, 648 (D.C. Cir. 1957).

Unlike some other regulatory statutes, the statutes relating to review of ICC orders do not purport to oust the administrative jurisdiction upon the filing of a petition for judicial review.[21] Thus, in the absence of a provision making the court's jurisdiction exclusive, and in view of the strong policy favoring prompt dispositions of temporary authority applications, it was error to hold that the ICC lacked jurisdiction to reopen the record in this case.

CONCLUSION

The statutes that vest jurisdiction to review ICC orders in the first instance in federal district courts create the potential for extreme variation in result among the districts. Such variations themselves create the potential for forum-shopping by disappointed parties before the agency, particularly in cases such as this, involving industry-wide opposition, where concerted efforts by trade associations can produce innumerable plaintiffs.[22] Because such decisions are re-

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[21] Compare, *e.g.*, § 19 of the Natural Gas Act, 15 U.S.C. § 717r (agency may modify or set aside orders until record is filed in Court of Appeals); § 10(d) of National Labor Relations Act, 29 U.S.C. § 160(d) (same).

[22] The instant case itself has strong overtones of forum shopping. Under 28 U.S.C. § 1398(a) suits to review ICC orders may be brought in the district in which any plaintiff has its principal office or residence. There were well over 100 protestants in the ICC proceeding, including the industry's leading trade association, the

viewable only in this Court, on direct appeal, the courts of appeals are not available to bring a pattern of uniformity to the decisions of the district courts. It is important to the proper administration of the Interstate Commerce Act, therefore, that this Court exercise its jurisdiction to preserve uniformity where a district court has departed significantly from established rules, and to resolve conflicts among districts just as it exercises jurisdiction to resolve conflicts among circuits in cases reviewable on certiorari. *See* Sup. Ct. R. 19 (1)(b). Appellant respectfully submits that this appeal presents just such a case.

The court below has now held in two cases—both the instant case and *Acme Cartage Co.* v. *United States,* 290 F. Supp. 453 (W.D. Wash. 1968)—that the ICC's rules prescribing the form and content of supporting shipper statements in temporary authority cases are "mandatory." In each case it has nullified considered decisions of the ICC on the highly technical and formalistic ground that these rules were not precisely complied with. In each case the court invalidated the agency action without considering whether the supposed deficiency caused prejudice to the plaintiffs and without determining whether the record as a whole contained evidence to support the ICC order.

The potentially disruptive effect that such decisions can have, if left uncorrected, is evidenced by the fact that these decisions of the lower court formed the basis for at least two subsequent attacks on ICC temporary

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American Trucking Associations, Inc. Thus, a judicial review action could have been brought almost anyplace in the United States. Yet the case found its way to the very court that decided *Acme Cartage, supra,* on exactly the same ground. Notably, the opinions in the instant case and *Acme* were written by the same judge.

authority orders. In both *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718 (April 21, 1969), and *Superior Trucking Co.* v. *United States*, 1969 Fed. Car. Cas. ¶ 82108 (N.D. Ga. 1969), the plaintiffs unsuccessfully sought to invalidate ICC orders on exactly the grounds relied on by the court below in this case and *Acme*.[23] It is clear, therefore, that to allow the rule of this case to stand is simply to invite disappointed protestants in temporary authority cases to challenge Commission orders under section 210a in court and to seek stays against such orders, thus frustrating the very purpose of section 210a to permit the ICC to make urgently needed and unavailable service possible on a summary basis.

For the foregoing reasons the Court should note probable jurisdiction of this appeal. Moreover, appellant respectfully suggests that it would be appropriate for three reasons for this Court, upon noting probable jurisdiction, to dispose of this appeal by a summary reversal of the court below. First, appellant believes that the Court's recent *per curiam* affirmance of the district court in the *Estes* case is controlling here. In *Estes* the appellants unsuccessfully attempted to have this Court rule that the ICC's temporary authority regulations are "mandatory," just as did the court below. Second, the decision of the court below is clearly erroneous, in that the court failed to consider whether the record as a whole contained evidence supporting the ICC decision, as it was required to do by established law. Third, summary dis-

[23] In *Estes* the plaintiffs expressly relied on *Acme Cartage*, and in *Superior* the plaintiffs expressly relied both upon *Acme Cartage* and the instant case.

position is particularly appropriate where time factors are of the essence, as they are in a case involving temporary motor carrier authority, and especially where that authority relates to the transportation of critical defense materials.

Respectfully submitted,

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July 22, 1969

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

CIVIL ACTION No. 3828

BLACK BALL FREIGHT SERVICE; CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; D-C INTERNATIONAL, INC.; GARRETT FREIGHTLINES, INC.; NAVAJO FREIGHTLINES, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; WESTERN GILLETTE, INC.; RISS & COMPANY, INC.; IML FREIGHT, INC.; and AMERICAN TRUCKING ASSOCIATIONS, INC., *Plaintiffs,*

YELLOW FREIGHT SERVICE; T.I.M.E. FREIGHT, INC.; TRANSCON LINES, INC.; CONSOLIDATED COPPERSTATE LINES; TRI-STATE MOTOR TRANSIT CO.; UNITED TRANSPORTS, INC.; BRASWELL MOTOR LINES, INC.; CENTRAL FREIGHT LINES, INC.; CENTRAL EXPRESS, INC.; RED ARROW FREIGHT LINES; BROWN EXPRESS, INC.; ALAMO EXPRESS, INC.; J. H. ROSE TRUCK LINE, INC.; J. J. WILLIS TRUCKING CO.; J. V. HARRISON TRUCK LINES, INC.; MILLER TRUCK LINE, INC.; H. S. ANDERSON TRUCKING CO.; CENTRAL FORWARDING, INC.; ROBERTSON TANK LINES, INC.; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE COLORADO AND SOUTHERN RAILWAY COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; ELGIN, JOLIET AND EASTERN RAILWAY COMPANY; FORT DODGE, DES MOINES AND SOUTHERN RAILWAY COMPANY; FORT WORTH AND DENVER RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; GREEN BAY AND WESTERN RAILROAD COMPANY; GULF MOBILE AND OHIO

RAILROAD COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; ILLINOIS TERMINAL RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD; MISSOURI PACIFIC RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY; AND UNION PACIFIC RAILROAD AND WATERLOO RAILROAD,

Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

AMERICAN FARM LINES, *Intervening Defendant.*

Opinion, Findings of Fact, Conclusions of Law

Before: JERTBERG, Circuit Judge, and BOLDT and GOODWIN, District Judges

BOLDT, District Judge:

American Farm Lines (AFL) made an application under the provisions of Section 210a(a) Interstate Commerce Act, 49 U.S.C.A. Section 310a(a)[1] and Ex Parte No. MC-67,

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[1] Interstate Commerce Act, Section 210a(a), as amended, 49 U.S.C. 310a(a), provides:

"To enable the provision of service for which there is an *immediate and urgent need* to a point or points within a territory having *no carrier service capable of meeting such need*, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter." (Emphasis added.)

Motor Carrier Temporary Authorities, 98 M.C.C. 483, 49 C.F.R. 1131, et seq., to the Interstate Commerce Commission (ICC) for a Temporary Authority to provide single-line motor carrier service. The application appeared in the Federal Register June 8, 1968. The thirty-five motor carrier plaintiffs in this action, twenty-eight intervening rail carrier plaintiffs and many other carriers, protested the application. The Temporary Authorities Board of the Commission (TAB) by order dated July 12, 1968, denied the application. AFL filed a petition for reconsideration, appealing the decision of TAB. Division 1 of ICC, acting as an Appellate Division, by order dated September 3, 1968, vacated the order of denial issued by TAB and granted the application.

Some of the plaintiffs and other carriers filed petitions for reconsideration, which were not authorized by the applicable rule, Ex Parte No. MC-67, *Motor Carrier Temporary Authorities,* 98 M.C.C. 483 at page 496, (49 C.F.R. 1131.6), since neither of the conditions authorizing such petitions was present:

> "(a) Petitions for reconsideration.—Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person."

Plaintiffs' complaint was filed in this court on September 26, 1968, together with a motion for an order to stay the going into effect of the ICC order of September 3, 1968.

This motion was argued October 2, 1968 before Judge Boldt per Title 28, Section 2284(3) and (5). After considering oral and written evidence and the argument of counsel, the Court entered an order staying the going into

effect of the ICC order of September 3, 1968, and declaring it to be otherwise inoperative pending determination in this Court of the issues presented in this proceeding, or until further order of this Court. At that hearing, counsel for ICC did not challenge the administrative finality of the ICC order of September 3, 1968. By its order of October 9, 1968, ICC recognized the stay order of this Court.[2]

On October 16, 1968, the Department of Defense filed with ICC a reply to the petitions for reconsideration, and on October 17, 1968, AFL filed a combined reply to the petitions for reconsideration and a petition to reopen. Many plaintiffs filed motions to strike these pleadings on the ground they were not authorized by ICC Rule 49 C.F.R. 1131.6, nor by any other rule.

On November 12, 1968, ICC filed in this court a "Motion to Stay Further Proceedings Herein," stating therein that

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[2] "Upon consideration of the record in the above entitled proceedings, and the entry of a temporary restraining order on October 3, 1968, by the United States District Court for the Western District of Washington in Civil Action No. 3828, *Black Ball Freight Service, et al* v. *United States*, wherein the Court stated in part:

> 'IT IS ADJUDGED AND ORDERED that that certain order of the Interstate Commerce Commission issued by it in its Docket MC-129908TA application of American Farm Lines, Oklahoma City, Oklahoma under date of September 3, 1968, be stayed from going into effect or otherwise be inoperative pending a determination by this Court of the issues of this proceeding, or until the further order of this Court.'

and good cause appearing therefor:

It is ordered, that the effective date and operation of the order heretofore entered September 3, 1968, in No. MC-129908TA be, and it is hereby, postponed until further order of the Commission.

It is further ordered, that in view of the Court's order and of the order of the Commission, American Farm Lines may not now perform any for-hire operations in interstate or foreign commerce pursuant to the Commission's order of September 3, 1968, entered in this proceeding.

on November 5, 1968, on its own motion, ICC had reopened the proceeding before it and requested a stay of further action in the case before this court. By their prompt opposition to this motion, plaintiffs contended that ICC was not authorized to reopen its proceeding because this court had taken jurisdiction of the matter. Also, plaintiffs asserted that even if the court had not taken jurisdiction, the ICC Rules precluded reopening of the proceeding. No action has ever been taken to note the ICC motion for hearing or to otherwise procure the stay sought by the motion.

The same contentions were presented to ICC is plaintiff's motion for vacation of the reopening order.

Since the ICC order of November 5, 1968 recited that a verified statement from the Department of Defense would be received, and no ruling having been made on their petitions to vacate the order of November 5, plaintiffs responded to the Caputo verified statement submitted by the Department of Defense. These responses asserted plaintiffs had satisfactorily performed all services previously requested of them and their willingness and ability to perform any service requested of them by any shipper, including the Department of Defense.

On December 19, 1968, ICC issued a new order in the same docket granting AFL the same temporary authority previously granted by the ICC order of September 3, 1968 as to which the stay order of this court was and still is in full effect.

On December 31, 1968, pursuant to Fed. Civ. R. 15(d), plaintiffs filed in this court a "Supplemental Complaint Setting Forth Transactions or Occurrences or Events Which Have Happened Since the Date the Original Complaint was Filed Herein" and a motion to stay the going into effect of the ICC order of December 19, 1968.

Following extended argument, on January 6, 1969, Judge Boldt entered an order restraining the going into effect of the ICC order of December 1968 and ordering it to be inoperative until further order of this court. Full hearing on the merits was heard by the Three-Judge Court on January 24, 1969.

The issuance of the ICC order of September 3, 1968 was based on a supporting letter written by the Department of Defense, dated May 15, 1968. The ICC also had before it a letter dated April 30, 1968 written to the president of AFL wherein the Department of Defense stated it was not in a position to verify that there would be insufficient or inadequate service to meet Department requirements in the absence of the single-line service AFL seeks to provide.

"As authorized by the ICC Act, after extended consideration the ICC adopted Testimony Authority Rules, effective July 5, 1965, specifying procedures for the submission and determination of temporary authority applications under Section 210(a) ICC Act. Ex Parte No. MC-67, 49 C.F.R. 1131. . . . The rules specifically provide in mandatory terms that each filed temporary authority application must be accompanied by one or more supporting statements and each such statement must contain at least the information specified in eleven categories," *Acme Cartage Co., et al. v. United States, et al.*, 290 F.Supp. 453 at page 454. Among those categories are:

"(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

"(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

The ICC Rules, 49 C.F.R. 1131 et seq., provide for the filing and processing of written temporary authority applications and establish standards and mandatory pro-

cedures applicable to all phases of the submission and determination of such applications. Except for supporting statements by the Department of Defense, the rules require "certified" evidentiary statements by the supporting shippers claiming to need the new service, and further require factual statements in a minimum of eleven specific categories. The rules require notice of the proceeding to be given by publication in the Federal Register and authorize protest of the application by "persons who can and will provide all or any part of the proposed service". Each protest must specify the service the protestant can and will offer and must be served upon the applicant. Submission of supplemental data after the applications are filed is not permitted. The ICC rules establish specific evidentiary standards for determination of each application for temporary authority and provide that grants "shall be only made" where the evidence "establishes" an immediate and urgent need in accordance with the prescribed standards.

Rule 49 C.F.R. 1131.4(b)(4) pertaining to single-line service provides:

> "Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved."

Plaintiffs assert the initial supporting letter accompanying AFL's temporary application did not provide the information required by 49 C.F.R. 1131.2(c), particularly (8) and (9) thereof, and that granting of the temporary authority in question without a showing of the required

information in effect denied them consideration of their protests. Plaintiffs contend no specific failure of service by plaintiffs has been asserted to which specific response could be made and that their response to generalities could only be met by their general assertions.

In their answer, defendants admit:

> "With respect to the allegations contained in the initial compliant, admit that the order of the Commission dated September 3, 1968 may not have been based upon evidence to support its conclusion."

In their brief, the defendants admit:

> "* * * That the Commission's order of September 3, 1968 (1) may not have been based upon evidence to support its conclusions."

These concessions indicate the ICC itself had strong misgivings concerning its compliance with the rules ICC itself had promulgated.

Defendants contend the ICC order dated September 3, 1968 became moot when ICC reopened the proceeding on November 5, 1968. This contention is without merit. Prior to reopening of the proceeding which resulted in the ICC order of September 3, 1968, judicial review of that order had been perfected pursuant to 28 U.S.C. 1336. Jurisdiction thereof vested in and had been exercised by this court in an extended evidentiary hearing wherein ICC actively participated. Following such hearing the stay order of this court was entered. In these circumstances, without prior leave of court, ICC was without authority to take any action which directly or indirectly might nullify or impair the jurisdiction of this court over the ICC order under review.

Defendants further contend that the ICC order of September 3, 1968 was not administratively final. However, at the oral argument on the merits defendants conceded

that plaintiffs were properly in court seeking review of that order.

Plaintiffs assert that the September ICC order was administratively final under the Temporary Authority Rules, 49 C.F.R. 1131.6, and that if those rules do not govern, the general ICC rule, 49 C.F.R. 1100.101(a)(2), is applicable:

> "All decisions, orders or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes or modifies a prior decision by a *hearing officer*, and those wherein the initial decision is made by a division." (Emphasis added.)

Indisputably this proceeding did not involve action by a hearing officer, but rather a reversal by ICC Division 1 of a prior determination by its Temporary Authority Board.[3]

Title 28 U.S.C. Section 1336 provides:

> "*Interstate Commerce Commission's orders.* (a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

The Supreme Court stated in *Pennsylvania Railroad Company* v. *United States*, 363 U.S. 202 (1960):

> "We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. Rochester

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[3] The disposition of an application by a Board does not constitute a hearing before a hearing officer. Compare Trans-American Freight Lines, Inc. v. U.S., 258 F. Supp. 910 (1966).

Tel. Corp. v. United States, 307 U.S. 125, 131, 132, 143, 83 L ed 1147, 1152, 1153, 1159, 59 S.Ct. 754."

And further:

"We have held that judicial review is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission. El Dorado Oil Works v. United States, 328 U.S. 12, 90 L ed 1053, 66 S.Ct. 843."

In Inland Steel v. U.S., 306 U.S. 153 (1939), the Court stated:

"*Third.* The appellant takes the position that the Commission's purported postponement of its command to cease and desist (eighteen months after the interlocutory injunction was granted) deprived the court of authority to enforce the conditions of its interlocutory injunction. However, since the court had exercised jurisdiction to review and suspend the Commission's report and order, the administrative body was without power to act inconsistently with the Court's jurisdiction, had it attempted to do so. . ."

Defendants do not dispute the fact that the ICC order of September 3, 1968 was a final grant of temporary authority to AFL to engage in operations thereunder, subject only to compliance with tariff requirements, and that the order was at that time reviewable by a three-judge court. Defendants have cited several cases [4] in support of

[4] Aberdeen & Rockfish RR v. United States, 270 F. Supp. 695 (E.D. La. 1967), Affirmed as Modified 393 U.S. 87 (1968); Alamo Express, Inc. v. United States, 239 F. Supp. 694 (W.D. Tex. 1965), Affirmed 382 U.S. 19 (1965); Donaldson v. Read Magazine, 333 U.S. 178 (1948); United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 294 U.S. 499 (1935); Anchor Line Limited v. Federal Maritime Commission, 299 F. 2d 124 (Ct. of Appeals, D.C. 1962); Atchison, Topeka and Santa Fe Railroad Company v. United States, 231 F. Supp. 422 (N.D. Ill. E.D. 1964).

their argument that the ICC retains "continuing jurisdiction over its orders at all times." However, none of the cases deals with the question now presented, i.e. whether, after a court has review jurisdiction of an ICC order and a stay of that order has been entered by the court, the ICC may nullify the review and the stay order by reopening the ICC proceedings. The ICC itself has answered this question in Central Freight Lines, Inc. v. Strickland Transportation Lines, Inc., 102 M.C.C. 291.

> ". . . Moreover, when the Court has exercised jurisdiction to review and suspend a report and order of the Commission, we are without power to act inconsistently. . ."

Even if ICC had jurisdiction to reopen the ICC proceeding and to consider the Caputo verified statement, it would not meet the requirements of categories (8) and (9) of ICC Rule 49 C.F.R. 1131.2(c).

The Caputo verified statement fails to show any efforts by the Department of Defense to obtain from existing carriers the service AFL seeks to provide, or the identity of any existing carriers who failed or refused to provide the needed service and the reasons given for any such failure or refusal. Statement of these matters is mandatorily required by categories (8) and (9).

At best, the Caputo verified statement merely states the Department of Defense preference for the continuance of AFL's service and the expansion of that service into single-line service. AFL has been performing service for the Department of Defense under the provisions of 49 U.S.C. 303(b)(5), but no issue pertaining to that service is now before this court. The fact that the Department of Defense may desire a new or expanded type of service by a particular carrier does not justify the granting of temporary authority to provide such service without full compliance with all mandatory ICC rules.

While under 49 U.S.C. 310a(a) the ICC is vested with wide discretion to grant temporary authority for motor carrier services, it may only do so when both conditions specified in the statute are shown to exist, i.e. (1) "an immediate and urgent need" for service, (2) "within a territory having no carrier service capable of meeting such need." It is clear from the language of the statute that in the absence of either one or both of the conditions specified, ICC "has neither power nor discretion to grant temporary authority applications . . . Variable and unpredictable enforcement of important and mandatorily stated rule provisions is inequitable in principle and unsound in practice." Acme Cartage Co. v. U.S., supra, at 456-457.

The court's Findings of Fact and Conclusions of Law are hereby found and held as stated in the foregoing Opinion.

For the reasons stated, we find that the granting of each Temporary Authority referred to in the foregoing Opinion was arbitrary, capricious and erroneous in law. Accordingly, each of the Temporary Authorities should be and hereby is held null and void. The stay order as to each Temporary Authority is continued in effect until further order of this court.

DATED this 26th day of March, 1969.

GILBERT H. JERTBERG
Gilbert H. Jertberg
United States Court of Appeals Judge

GEORGE H. BOLDT
George H. Boldt
United States District Court Judge

WILLIAM N. GOODWIN
William N. Goodwin
United States District Court Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

CIVIL ACTION No. 3828

Judgment

BLACK BALL FREIGHT SERVICE; CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE; D-C INTERNATIONAL, INC.; GARRETT FREIGHTLINES, INC.; NAVAJO FREIGHTLINES, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; WESTERN GILLETTE, INC.; RISS & COMPANY, INC.; IML FREIGHT, INC.; and AMERICAN TRUCKING ASSOCIATIONS, INC., *Plaintiffs,*

YELLOW FREIGHT SERVICE; T.I.M.E. FREIGHT, INC.; TRANSCON LINES, INC.; CONSOLIDATED COPPERSTATE LINES; TRI-STATE MOTOR TRANSIT CO.; UNITED TRANSPORTS, INC.; BRASWELL MOTOR LINES, INC.; CENTRAL FREIGHT LINES, INC.; CENTRAL EXPRESS, INC.; RED ARROW FREIGHT LINES; BROWN EXPRESS, INC.; ALAMO EXPRESS, INC.; J. H. ROSE TRUCK LINE, INC.; J. J. WILLIS TRUCKING CO.; J. V. HARRISON TRUCK LINES, INC.; MILLER TRUCK LINE, INC.; H. S. ANDERSON TRUCKING CO.; CENTRAL FORWARDING, INC.; ROBERTSON TANK LINES, INC.; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE COLORADO AND SOUTHERN RAILWAY COMPANY; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; ELGIN, JOLIET AND EASTERN RAILWAY COM-

PANY; FORT DODGE, DES MOINES AND SOUTHERN RAILWAY COMPANY; FORT WORTH AND DENVER RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; GREEN BAY AND WESTERN RAILROAD COMPANY; GULF MOBILE AND OHIO RAILROAD COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; ILLINOIS TERMINAL RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD; MISSOURI PACIFIC RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY; ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; TOLEDO, PEORIA AND WESTERN RAILROAD COMPANY; AND UNION PACIFIC RAILROAD AND WATERLOO RAILROAD,

Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

AMERICAN FARM LINES, *Intervening Defendant.*

This cause came on for trial on the merits before the undersigned judges as a three-judge court on January 24, 1969 and after the argument of counsel was submitted for decision. The court now having made and entered herein its Opinion, Findings of Fact and Conclusions of Law in writing, and being fully advised in the premises, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that each of the Temporary Authorities issued by the Interstate Commerce Commission to intervening defendant American Farm Lines on September 3, 1968 and December 19, 1968, respectively, be and the same hereby is held and adjudged null and void.

The stay order as to each of said Temporary Authorities is continued in effect until further order of this court.

DATED this 26th day of March, 1969.

GILBERT H. JERTBERG
Gilbert H. Jertberg
United States Court of Appeals Judge

GEORGE H. BOLDT
George H. Boldt
United States District Court Judge

WILLIAM N. GOODWIN
William N. Goodwin
United States District Court Judge

APPENDIX C

Order

SERVICE DATE
SEPTEMBER 5, 1968

TA-GR-1-1

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, acting as an Appellate Division, held at its office in Washington, D. C., on the 3rd day of September, A. D. 1968.

No. MC 129908 TA

AMERICAN FARM LINES
OKLAHOMA CITY, OKLAHOMA

The above-entitled application under Section 210a(a) of the Interstate Commerce Act, and applicant's petition for reconsideration of the order of the Commission, Temporary Authorities Board, entered herein on July 12, 1968, and reply or replies thereto being under consideration and good cause therefor appearing:

It is ordered, That said order of the Commission, Temporary Authorities Board be, and it is hereby, vacated and set aside .

And it appearing, That there is an immediate and urgent need for the motor carrier service described in the appendix hereto, and that there is no carrier service available capable of meeting such need;

It is further ordered, That applicant be, and is hereby, granted temporary authority, conditioned upon full compliance with all applicable statutory and Commission requirements concerning tariff publications, evidence of security for the protection of the public, and designation of agents upon whom process may be served, to engage in the business of transportation by motor vehicle, in interstate or foreign commerce, to the extent and in the manner set forth in the appendix hereto, subject to the further conditions that unless otherwise provided in the appendix, (1) the service herein authorized shall be limited to the movement of traffic which originates at and is destined to the points and areas specified in the appendix, and (2) no operating right separately described in the appendix may be combined with any other operating right therein described or with any other temporary or permanent authority now held by, or hereafter issued to, applicant or any other carrier.

It is further ordered, That the service authorized by this order shall not be commenced unless and until all the above-specified requirements have been met and applicant has received notice from the Commission that compliance has been effected and service may be instituted.

It is further ordered, That upon the authority herein granted becoming effective, failure of applicant to render reasonably continuous and adequate service to the public pursuant thereto and to maintain compliance with statutory and Commission requirements shall constitute sufficient

grounds for suspension, change, or revocation of the said authority.

It is further ordered, That if applicant fails to comply with all applicable statutory and Commission requirements, rules and regulations within 30 days from the date hereof, or such additional time as the Commission may specifically grant, this order shall be of no further force and effect and the said application shall be deemed to be denied for want of prosecution and applicant so notified.

And it is further ordered, That, except as herein granted, the said application be, and it is hereby, denied.

By the Commission, Division 1, acting as an appellate division.

H. NEIL GARSON,
Secretary.

(SEAL)

TA-GR-1

APPENDIX

No. MC 129908 TA

AMERICAN FARM LINES
OKLAHOMA CITY, OKLAHOMA

By the order of which this appendix is a part, entered under the name and number shown above, applicant upon compliance with the conditions set forth therein and after receipt of notice from the Commission that the said conditions have been met, and provided the operations are begun within the time allowed in said order or any extension thereof, is authorized to engage in the business of transportation by motor vehicle, in interstate or foreign commerce as follows:

Time for which authority is granted—90 days

Type of carrier—Common

Service authorized—

General commodities, including Classes A and B explosives, moving on Government bill of lading, over irregular routes,

Between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Utah and Arizona.

SAFETY CONDITION: This grant of authority is conditioned upon applicant's maintenance of a satisfactory degree of compliance with the Federal Highway Administration's (Department of Transportation) Motor Carrier Safety Regulations. In the event of non-compliance with these regulations, that Administration may submit a recommendation for revocation of the authority.

APPENDIX D

BEFORE THE
INTERSTATE COMMERCE COMMISSION

MC-129908 TA

IN THE MATTER OF:
AMERICAN FARM LINES—TEMPORARY
AUTHORITY APPLICATION

Verified Statement of Vincent F. Caputo

My name is Vincent F. Caputo. I am employed by the Department of Defense (DOD) as the Director for Transportation and Warehousing Policy. The duties of my position are such that I am charged with the responsibility for, among other things, the efficient and economical operation of physical distribution activities of the DOD.

This Commission has previously been advised by DOD that it has a substantial and continuing need for the serv-

ices of American Farm Lines in the transportation of general commodities, including Class A and B explosives, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washington, Arizona, California, Nevada and Utah.

The Commission, by order served 5 November 1968, reopened this proceeding "for the purpose of receiving a verified statement from the Department of Defense which shall, to the extent the national defense and security will permit disclosure, specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers." This statement is submitted in response to that order.

In discharging its responsibility for conduct of the nation's defense, the DOD must effect movement of a vast quantity of a multitude of different commodities between innumerable points and places within the United States and abroad. A substantial percentage of its total transportation requirement is for movement of diverse types of traffic between points in the states of Kentucky, Indiana, Illinois, Missouri, Louisiana, Arkansas, Texas, Kansas and Oklahoma, on the one hand, and, on the other, points in Washington, California, Arizona, Nevada and Utah. For example, in the 11 month period between 1 August 1967, and 30 June 1968, the DOD required transportation service for the movement of the following amounts of "general commodities (including Class A and B explosives)" to points in Washington, California, Arizona, Nevada and Utah:

1. 38,892,000 pounds from points in Kentucky;
2. 480,656,000 pounds from points in Indiana;
3. 173,538,000 pounds from points in Illinois;
4. 91,364,000 pounds from points in Missouri;

5. 189,312,000 pounds from points in Louisiana;

6. 18,858,000 pounds from points in Arkansas;

7. 252,844,000 pounds from points in Texas;

8. 21,482,000 pounds from points in Kansas; and

9. 190,118,000 pounds from points in Oklahoma.

Typical origins from which traffic moved in the indicated period include governmental and commercial installations located at or near such points as: St. Louis, Lake City, Sweetsprings, Herman, Glasgow, Harrisonville, Springfield and Joplin, Missouri; McAlester, El Reno, Lawton, Oklahoma City, Miami, Southard and Tulsa, Oklahoma; Rogers, Pine Bluff, Camden and Magnolia, Arkansas; Avon, Richmond and Louisville, Kentucky; Crane, and Indianapolis, Indiana; Alton, East Alton, Granite City and Marion, Illinois; Texarkana, Amarillo, Fort Worth, Dallas, Garland, Carrolton, Longview and Karnack (Marshall), Texas; Atchison, Parsons, Wichita and Junction City, Kansas; and Doyline, Louisiana. Typical destinations to which this traffic moved include installations at or near the following points: Port Chicago, Fallbrook, San Diego, Victorville, Twenty Nine Palms, Seal Beach, Fairfield, Merced, China Lake, Vallejo, Sacramento, Industrial City, Oakland, Herlong, Concord, Arlington, Chico, Lathrop and Susanville, California; Bellemont and Yuma, Arizona; Ogden, Salt Lake City and Warner, Utah; Fallon and Hawthorn, Nevada; and Bangor, Tacoma and Bremerton, Washington.

In the same period, DOD required service for movement of 499,968,000 pounds of "general commodities (including Class A and B explosives)" in the reverse direction. Of that total, 17,914,000 pounds moved from points in Arizona; 385,906,000 pounds from points in California; 19,528,000 pounds from points in Nevada; 54,342,000 pounds from points in Utah; and 22,278,000 pounds from points in

Washington. Typical origins are: Los Angeles, Concord, Sacramento, Oakland, Lathrop, Richmond, Twenty-Nine Palms, Fairfield, El Segundo, San Bernardino, La Mirada, Vallejo, San Jose, Santa Clara, Vernon, El Monte, Herlong, Lompac, Fallbrook, Culver City, Seal Beach, Burbank, Long Beach, National City, Marysville, Oceanside, Victorville, Lyoan, Palmdale and Stockton, California; Hawthorn and Nellis Air Force Base, Nevada; Yuma, Litchfield Park, Flagstaff, Phoenix, Goodyear, Tucson and Glendale, Arizona; Bangor, Tacoma and Bremerton, Washington; and Ogden, Tooele and Dugway, Utah. These movements were destined to numerous points distributed throughout the involved midwestern, southern and southwestern states. Indicative of this is the fact that these destinations include virtually all of the points at which "westbound" traffic is originated and also includes some points at which traffic moving in the reverse direction is not originated.

As shown in the period between 1 August 1967, and 30 June 1968, the DOD required service for the movement of a total of more than 1,900,000,000 pounds of freight between the territories, American Farm Lines seeks to serve. That traffic consisted of thousands of different articles and commodities. Representative items are: numerous items falling within the definition of Class A and Class B explosives; ammunition, ammunition links; nonexplosive practice bombs and mines; bomb bodies and bomb body parts; aerial bomb cluster adapters; bullets or bullet cores; canisters; salvaged cannon; new and used cartridge cases; coils: dummy charges, fuzes; dummy grenades; gun wads; solid or practice projectiles or rocket heads, projectile or rocket parts; empty projectile or rocket parts; electric, electronic or scientific instruments; iron or steel shot; bomb band shipping assemblies and shell shipping assemblies; shipping cans; bomb fin assemblies or rocket fin assemblies; howitzer cannons and mortars; gun barrels and/or gun mounts; machined iron and steel articles; plastic and plastic and metal combined; rocket chambers; bomb racks;

internal combustion, jet and steam engines and parts thereof; paper articles including forms, booklets and cards; small arms; hand or rifle grenades; smoke grenades; starting cartridges or fuzes; tents; paulens; life rafts; runway covers; boots; shoes; unclassified and unsegregated salvage; surplus equipment and supplies returned from overseas; military impediments; helium gas and returned empty chambers; and canned fruits, vegetables and dried fruit.

This tremendous volume of traffic that DOD must move between numerous and varying points in the involved territories is transported by rail or motor vehicle and, in extreme emergency situations, by aircraft. A part of this traffic requires that it be transported from origin to destination in the most expeditious manner possible. However, the use of aircraft is prohibitively expensive for movement of volume shipments except in the most extreme emergencies. It follows, therefore, that the availabliity of motor carriers that provide service over the most direct routes and in a manner that restricts time in transit to a minimum is imperative. This defense need for speed has not been met in many, many instances by the current certificated motor carriers due to a number of factors, including the following:

1. The majority of all certificated motor carrier service now available to the DOD is provided upon a joint line basis. In fact, a substantial part of the certificated motor carrier service now available between major origins and destinations, in point of volume, requires participation by at least two carriers in addition to the originating carrier. Experience has shown that where joint line service is involved, we must in some cases allow no less than 24 hours for each 300 miles in order to arrive at a "time in transit" that can be relied upon. In contrast, single line service operating over the most direct routes available, by use of "two-man driving teams" generally can be relied upon

to consistently provide delivery within a transit time computed by allowing 8 hours for each 300 "short line" miles involved.

2. Virtually all carriers currently holding authority to provide service between points in the territories involved here are "regular route" carriers. They must necessarily traverse prescribed routes which are often circuitous. Thus, even where such carriers are authorized to provide service upon a single line basis between particular origins and destinations, they are still required to operate over greater distances than would be necessary if they held "irregular route" authorizations; and

3. Some "regular route" carriers utilize "single" drivers rather than "two-man driving teams". These "single" drivers operate the vehicle between established "relay" points. Further, I understand that some of these carriers do not "qualify" or license their power units in all states through which they operate. As a result, even in those instances where they hold authority for provision of single line service, it is routine for these "regular route" carriers to use a number of different power units and drivers in effecting delivery of a single shipment moving between points in the territories involved here. This situation sometimes results in delays due to such things as temporary unavailability of power equipment at relay points, unavailability of a driver for immediate movement beyond the relay points, and the myriad of other inevitable snags that seem to occur when it is necessary for shipments to be processed through a number of different terminals.

As I pointed out before, service offered by currently authorized motor carriers for the movement of DOD traffic between points in the involved territories is not generally available upon a single line irregular route basis. This has created a situation where "time in transit" required for the movement of given shipments are in excess of those dictated by the short line distances between origins and

destinations. The extent to which "times in transit" experienced in use of currently certificated carriers exceed those which would be experienced if service were performed by irregular route carriers on a single line basis by use of "two-man driving teams" is clearly disclosed by the following examples:

1. Some shipments of Class A and Class B explosives moving from McAlester, Oklahoma, to Bangor, Washington, are in transit for periods varying from 6 to 11 days when use of "joint line" service is necessary. In contrast, the one carrier now holding a certificate authorizing it to provide single line service for movement of such shipments on an irregular route basis consistently effects "third morning" delivery at Bangor, Washington;

2. Shipments of empty shell cases from San Jose, California, to Doyline, Louisiana, consistently require transit times of 5 to 6 days when handled on a "joint line" basis. In contrast, delivery is made within 72 hours after dispatch of the shipment from San Jose, California, when service is provided on a single line basis by carriers using "two man driving teams"; and

3. The only known certificated carrier service now available for movement of the various types of commodities being shipped from St. Louis, Missouri, to points throughout California is that of "regular route" carriers. In some instances service is available from this type of carrier on a single line basis while in other instances the only service available is that offered on a "joint line" basis. However, even in those instances where service is available from "regular route" carriers on a single line basis, "transit times" that could be afforded by carriers holding "single line" authority for operation over irregular routes would be little more than half that now experienced through use of "regular route" carriers.

From a Defense point of view, any transportation system which is largely comprised of carriers holding "bits and pieces" of authority which preclude rendering of expeditious service is inherently inefficient. In addition, such a system is inefficient because it does not permit the provision of transportation service that is fully possible and practical under proven techniques. Yet, this is the precise situation that DOD has for years been forced to "live with" in its effort to efficiently and economically procure and distribute the vast quantities of various commodities, including Class A and Class B explosives, required for implementation of the nation's policies related to national defense. This is well illustrated by the fact that to my knowledge no carrier holds authority permitting it to provide service on a single-line basis for movement of all of the involved commodities between *all* points in any one of the nine midwestern, southern and southwestern states involved in this proceeding, on the one hand, and, on the other, all points in *any* of the five involved western states. In fact, DOD has been unable to find a single carrier that is authorized to provide such service from *any* origin in *any* of the midwestern, southern and southwestern states involved here to *all* points in the state of California. The same situation prevails with respect to authority of presently certificated carriers for movemen tof the involved commodities in the reverse direction. In addition, no carrier to my knowledge holds authority to provide single line service, whether over circuitous routes or otherwise, for movement of all of the involved commodities from many of our major origins to many of our major destinations. The extent to which this deplorable situation exists is clearly shown by the following examples:

1. There is no known carrier authorized to transport DOD traffic in single line service from the Naval Ammunition Depot at McAlester, Oklahoma, to Port Chicago, Fallbrook, Herlong, Camp Pendleton, Ft.

Ord, George Air Force Base, or Twenty-Nine Palms, California; Fallon or Hawthorn, Nevada; Tooele Air Force Base, Utah; or Ballemont, Arizona;

2. There is no known carrier authorized to transport DOD traffic in single line service from Rogers, Arkansas, to any point in California;

3. There is no known carrier authorized to provide single line service for movement of DOD traffic from either Pine Bluff or Camden, Arkansas, to any destination in California, Arizona, Nevada or Utah;

4. There is no known carrier authorized to provide single line service for movement of DOD traffic from Magnolia, Arkansas, to any point in California;

5. There is no known carrier authorized to provide single line service for movement of DOD traffic from the Blue Grass Ammunition Depot, Avon, Kentucky, or from Blue Grass Activity, Richmond, Kentucky, to points in California.

6. There is no known carrier authorized to transport Class A and Class B explosives on a single line basis from Lake City Ammunition Plant, Lake City, Missouri, to points in California.

7. There is no known carrier authorized to transport DOD traffic on a single line basis from Lone Star Ammunition Plant or from the Red River Arsenal, Defense, Texas, to points in Arizona, Nevada, Utah, California or Washington;

8. There is no known carrier authorized to provide single line service from Longhorn Army Ammunition Plant, Karnack, Texas, to points in the involved western states;

9. There is no known carrier authorized to provide single line service from the Kansas Army Ammunition Plant,

Parsons, Kansas, to points in the western states involved;

10. There is no known carrier authorized to provide single line service for movement of DOD traffic from the Sacramento Army Depot, Sacramento, California, to Ft. Sill, Oklahoma, or to Ft. Riley, Kansas; and

11. There is no known carrier authorized to provide single line service for movement of DOD traffic from Twenty-Nine Palms, California, to Defense, Texas; from Sharpe Army Depot, Lathrop, California, to Ft. Sill, Oklahoma, or to Ft. Leonard Wood, Missouri; from Yuma Proving Grounds, Yuma, Arizona, to Amarillo, Texas; from Travis Air Force Base, Fairfield, California, to Crane, Indiana; from La Mirada, California, to Crane, Indiana; from San Jose or Santa Clara, California, to Pine Bluff, Arkansas, or Shreveport, Louisiana; from Vernon, California, to Pine Bluff, Arkansas; from Sierra Army Depot, Herlong, California, to Ft. Riley, Kansas, or to Lone Star Army Ammunition Plant, Defense, Texas, or to Crane Naval Ammunition Depot, Crane, Indiana; from Fallbrook, California, to Naval Ammunition Depot, McAlester, Oklahoma; from Litchfield Park, Arizona, to Longhorn Army Ammunitoin Plant, Karnack, Texas; from Goodyear, Arizona, to Lexington, Kentucky; from Naval Ammunition Depot, Hawthorn, Nevada, to Naval Ammunition Depot, McAlester, Oklahoma; from Tracy Defense Depot, Lyoth, California, to Oklahoma City, Oklahoma, or to Ft. Leavenworth and Ft. Riley, Kansas; nor from Stockton, California, to Crane, Indiana.

DOD is charged with the total responsibility for the execution of all functions incidental or necessary to the defense of the country. It is also charged with the responsibility for conducting those functions in the most

efficient and economical manner possible. However, enforced reliance upon motor carrier service available from presently certificated carriers for movement of vast quantities of freight, comprised of "general commodities (including Class A and Class B explosives)", between points in territories involved here has effectively subverted efforts to establish the most economical and efficient distribution system possible. This is evident, as I previously pointed out, from the fact that unduly excessive "times in transit" are experienced in the movement of this traffic by use of the currently authorized carriers. I might also point out that this results in higher cost to the taxpayers.

The fact that there is a paucity of expedited service available from presently authorized carriers is, in and of itself, ample proof that the additional service which American Farm Lines seeks authority to provide is necessary *to assure that the Government's reasonable transportation requirements* are met. In addition, I feel that the quantity of freight which DOD must regularly move between the involved areas is so vast that the need for the grant of authority sought is beyond question.

In many instances it is necessary to closely coordinate the arrival of inbound shipments with production schedules of manufacturing installations. For example, production at the Louisiana Army Ammunition Depot, Doyline, Louisiana, and at the Pine Bluff Arsenal, Pine Bluff, Arkansas, is dependent upon coordinated arrival of inbound materials. This is true because neither of these installations warehouse some types of ammunition produced at those points and incoming shipments of such items as empty shell cases are fed into the production line directly from the delivery vehicle. Accordingly, it is imperative that such inbound shipments arrive at the time expected. In addition, production of the shell cases at San Jose, California, is such that it is impossible to gear shipments from that point to Doyline and Pine Bluff so as to "accommo-

date" them to the excessive and widely varying transit times which result from use of most presently available "joint-line" services of regular route carriers. Every possible "routing" has been used for movement of these shipments. However, only one of the currently certificated common carriers on occasion has proven able to provide the "timed" delivery necessary to efficient operation of production facilities located at such points as Dayline, Louisiana, and that carrier alone does not have the capacity to move the tremendous volume required. This situation exists even though those carriers were specifically made aware of the fact that the "timed" delivery requested was essential to the national defense effort. Under these circumstances, there is no doubt but that the continued existence of situations of the type just described clearly shows that the Government has a substantial requirement for provision of expedited service of a type which "regular route" carriers are not now providing.

A substantial segment of the involved traffic consists of movements to air bases and port installations for trans-shipment beyond the continental limits of the United States. When shipments are assigned to specified vessels or aircraft for trans-shipment, it is imperative that they arrive at destination on a planned basis before the scheduled ship loading or air lift date. Nevertheless, the DOD has experienced situations where shipments routed via currently certificated carriers fail to arrive at destination in time for the scheduled trans-shipment. This occurs even though shipments are loaded at interior origin points sufficiently in advance of the scheduled trans-shipment date to allow for the transit times normally required by the particular carriers involved. A concrete example of this type of difficulty experienced in use of presently authorized carriers lies in the fact that failure of certificated carriers to provide promised three-day transit time on shipments from St. Louis, Missouri, to San Francisco, California, has re-

sulted in shipments arriving at destination after ships which were scheduled to move the traffic overseas had departed. There can be no question whatever but that the existence of service failures of this type are themselves sufficient to require that additional motor carrier service be made available for movement of DOD traffic.

It is at times desirable to formulate truckload shipments which are composed in Part of Class A and Class B explosives and in part of various other types of commodities that are normally referred to as "freight all kinds". However, it is many times impossible to ship in this fashion because carriers that hold authority for transportation of "general commodities" often do not hold co-extensive authority for transportation of Class A and Class B explosives. The inherent inadequacy in service that can be offered by carriers whose authority is "hamstrung" in this fashion is obvious.

As has been demonstrated, the type of service which can be provided by currently certificated carriers often does not meet DOD's transportation requirements for movement of traffic that requires expedited movement and precisely timed delivery. However, until recently DOD had no practical choice but to rely entirely upon that service. That situation changed in the latter part of 1966 when a number of cooperative agricultural associations, including American Farm Lines, made themselves known to DOD and began soliciting its traffic for movement pursuant to the exemption from economic regulation provided by Section 203(b)(5) of the Interstate Commerce Act. In due course, DOD began using the service offered by American Farm Lines for movement of Class A and Class B explosives and for movement of "general commodities" between various points in Kentucky, Illinois, Indiana, Missouri, Arkansas, Louisiana, Texas, Kansas and Oklahoma, on the one hand, and, on the other, various points in California, Arizona, Nevada and Utah and other states. It was immediately

discovered that the service of American Farm Lines was superior to that available from presently certificated motor carriers because its service was invariably provided by use of "two-man driving teams" operating over the most direct routes possible from origin to destinations and which was available between any and all points in broad multi-state territories.

The completely flexible and highly expedited service offered by American Farm Lines was used with ever increasing frequency throughout 1967 and the first several weeks of 1968. This was due to the fact that American Farm Lines was an organization whose service was capable of meeting DOD's accelerating need for such regularly required transportation niceties as precisely "timed deliveries" and absolute minization of time in transit. Thus, American Farm Lines transported a total of 74,155,685 pounds in the period between December 1966 and 30 June 1968. In every instance the service provided was excellent and met DOD service requirements.

Service provided by American Farm Lines is used to complement rather than to replace service available from certificated motor carriers and collectively these services have proven adequate to meet the Government's transportation requirements. Accordingly, DOD now relies upon the availability of its expedited and flexible service as well as the more rigid service available from certificated carriers in the movement of DOD traffic. The use of service provided by American Farm Lines has proven most beneficial. Examples of this include:

1. On 30 August 1968, the DOD shipped 22 truckloads of small arms ammunition from Lake City, Missouri, to Port Chicago, California, for export. The defense requirement was for this shipment to move "intact" which is to say, departing on the same day and arriving on the same day. A further requirement was for

arrival on or before 30 September 1968. No regulated carrier serving that base could provide the equipment needed and effect delivery within the required time. This shipment was delivered on 2 September 1968, within the requirement, by American Farm Lines;

2. On 3 May 1968, the DOD shipped special test items from Camden, Arkansas, to U.S. Army Proving Ground, Dugway, Utah. The defense requirement was for arrival before 7:00 A.M., 6 May 1968. American Farm Lines delivered the shipment on 5 May 1968. The certificated carriers serving Camden to Dugway would have required three participating carriers, and based upon our experience, would not have complied with the desired date of delivery;

3. American Farm Lines was called to deliver a shipment of Chemical Agent O and riot control agent from Fort Estill, Kentucky, to Travis Air Force Base, California, for airlift beyond. The requirement was for pickup on 3 October 1967, for connection with airlift no later than 7 October 1967. It was delivered 6 October 1967. American Farm Lines provides the only direct line service to our knowledge and, based upon our experience, the requirement could not have been met by interline carriers;

4. On 5 March 1968, "freight of all kinds" was picked up by American Farm Lines from Pine Bluff Arsenal, Arkansas, and delivered to Hill Air Force Base, Utah. The defense requirement was for delivery on 7 March 1968. It was delivered on that date for a two-day transit time. American Farm Lines provides the only direct service between these points. Our experience shows that no interline routing through certificated carriers could have effected delivery within the required time; and

5. On 20 April 1967, "freight of all kinds" was shipped from Edwardsville, Illinois, to Naval Weapons Station,

Vallejo, California. The defense requirement was for delivery on Sunday, 23 April 1967, and was delivered on that date by American Farm Lines which provides the only direct line service between these points. Our experience shows that no interline carrier could have met the requirement.

Injunctions issued by the United States District Court for the Western District of Oklahoma now precludes American Farm Lines from rendering much of the completely flexible service previously provided. In addition, recently enacted legislation will limit even more drastically the ability of American Farm Lines to provide fully flexible service in the future.

In the opinion of the DOD, grant of the authority sought by American Farm Lines would not adversely affect existing carriers to any material extent. Conversely, grant of its application for temporary authority would merely permit American Farm Lines to provide, on a certificated basis, the same service that it provided upon an "exempt" basis prior to 21 February 1968, and would be most beneficial to DOD in the discharge of its responsibility for conduct of the national defense.

As I have tried to make clear, the DOD has a substantial and continuing need for the service proposed in this proceeding. To this end it has already advised the Commission of its support for comparable permanent authority. In addition, this Commission is urged to promptly grant the instant application for temporary authority in order that the DOD can continue to receive the service that it was receiving prior to the injunction issued against American Farm Lines.

VERIFICATION

County of ..... }
State of ..... } ss:

Vincent F. Caputo, being duly sworn, deposes and says that he has read the foregoing statement and knows the content thereof; and that the same are true as stated.

.....
Vincent F. Caputo

Subscribed and sworn to before me, a notary public, in the county and state aforesaid, this .... day of ..... 1968.

.....
Notary Public

My commission expires .....

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, postage prepaid, by first-class mail to each arty less than 1,000 miles distant and by air mail to those parties more than 1,000 miles distant.

Dated at Washington, D. C., this 20th day of November 1968.

.....
Curtis L. Wagner, Jr.
Chief, Regulatory Law Division
Office of The Judge Advocate General
Department of the Army
Washington, D. C. 20310

APPENDIX E

Order

SERVICE DATE DECEMBER 20, 1968

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C. on the 19th day of December 1968.

No. MC-129908 TA

AMERICAN FARM LINES

(Oklahoma City, Okla.)

Upon consideration of the record in the above-entitled proceeding granting to American Farm Lines on September 3, 1968, a 90-day temporary authority to conduct motor common carrier operations and transport general commodities, including Class A and B explosives, moving on a Government bill of lading, over irregular routes, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and, on the other, points in Arizona, California, Nevada, Utah and Washington and (1) the entry of a temporary restraining order on October 3, 1968, by the United States District Court for the Western District of Washington in Civil Action No. 3828, *Black Ball Freight Service, et al.* v. *United States,* enjoining the order of September 3, 1968, from going into effect or otherwise becoming operative; and (2) the filing on various dates in September and October 1968, of numerous petitions of protestants for reconsideration of the said order of September 3, 1968; and replies thereto by applicant and the Department of Defense and (3) the Commission's order of November 5, 1968, reopening the proceeding for the purpose of receiving evidence from the respective parties in the form of verified statements; and

It appearing, That as a result of the said order of November 5, 1968, there were filed verified statements and a number of pleadings directed to the said order of November 5, 1968, and/or to the various verified statements, all of which are now a part of the record before us on reconsideration and have been considered, but will not be specifically described in this order.

It further appearing, That by its verified statement, filed November 20, 1968, the Department of Defense has established:

(1) That, in discharging its responsibility for the conduct of the Nation's defense, it imperatively requires service over the most direct routes in a minimum transit time to effect movement of a vast quantity of numerous commodities between innumerable points and places within the United States and abroad;

(2) That it has experienced inefficient and circuitous joint-line transportation by the use of existing carrier services which have been deficient for its needs, particularly relating to the coordination of the arrival of inbound shipments with the production schedules of manufacturing installations and the departure times and transshipment dates of matters and materials necessary to the national defense;

(3) That it has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs;

(4) That there is nothing in this record to establish that any of the protesting carriers provide a service to meet its needs;

(5) That unless applicant is granted the temporary authority sought herein, the Department of Defense will be without an expedited and flexible service for which it has an immediate and urgent need necessary to the defense of the country; and

(6) That, in balancing the scales of public interest, it is necessary to assure that the Government's immediate and urgent transportation requirement be met by an expedited and flexible service which will be used to complement rather than replace existing services.

Wherefore, and good cause appearing therefor:

It is ordered, That applicant be, and is hereby, granted temporary authority, conditioned upon full compliance with all applicable, statutory and Commission requirements concerning tariff publications, evidence of security for the protection of the public, and designation of agents upon whom process may be served, to engage in the business of transportation by motor vehicle, in interstate or foreign commerce, to the extent and in the manner set forth in the appendix hereto, subject to the further conditions that unless otherwise provided in the appendix, (1) the service herein authorized shall be limited to the movement of traffic which originates at and is destined to the points and areas specified in the appendix, and (2) no operating right separately described in the appendix may be combined with any other operating right therein described or with any other temporary or permanent authority now held by, or hereafter issued to, applicant or any other carrier.

It is further ordered, That the service provided for in this order shall not be commenced until all requirements have been met and applicant has received notice from the Commission and compliance has been effected and service may be instituted.

It is further ordered, That upon the authority herein granted becoming effective, failure of applicant to render reasonably continuous and adequate service to the public pursuant thereto and to maintain compliance with statutory and Commission requirements shall constitute sufficient grounds for suspension, change, or revocation of the said authority.

It is further ordered, That if applicant fails to comply with all applicable statutory and Commission requirements, rules, and regulations within 30 days from the date hereof, or such additional time as the Commission may specifically grant, this order shall be of no further force and effect and the said application shall be deemed to be denied for want of prosecution and applicant so notified.

And it is further ordered, That except as herein granted the said application and the pleadings referred to in the second paragraph hereof, be, and they are hereby, denied.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON
Secretary

(SEAL)

APPENDIX

No. MC 129908 TA

AMERICAN FARM LINES

OKLAHOMA CITY, OKLAHOMA

By the order of which this appendix is a part, entered under the name and number shown above, applicant upon compliance with the conditions set forth therein and after receipt of notice from the Commission that the said conditions have been met, and provided the operations are begun within the time allowed in said order or any extension thereof, is authorized to engage in the business of transportation by motor vehicle, in interstate or foreign commerce as follows:

Time for which authority is granted—180 days

Type of carrier—Common

Service authorized—

General commodities, including Classes A and B explosives, moving on Government bill of lading, over irregular routes,

Between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and, on the other, points in Washington, California, Nevada, Utah and Arizona.

SAFETY CONDITION: This grant of authority is conditioned upon applicant's maintenance of a satisfactory degree of compliance with the Federal Highway Administration's (Department of Transportation) Motor Carrier Safety Regulations. In the event of non-compliance with these regulations, that Administration may submit a recommendation for revocation of the authority.

APPENDIX F

SERVICE DATE
November 5, 1968

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C. on the 5th day of November, 1968.

No. MC-129908 TA

AMERICAN FARM LINES

(Oklahoma City, Okla.)

Upon consideration of the record in the above-entitled proceeding granting to American Farm Lines on September 3, 1968, a 90-day temporary authority to conduct motor

common carrier operations and transport general commodities, including Class A and B explosives, moving on a Government bill of lading, over irregular routes, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and, on the other, points in Washington and Arizona; and (1) the entry of a temporary restraining order on October 3, 1968, by the United States District Court for the Western District of Washington in Civil Action No. 3828, *Black Ball Freight Service, et al.* v. *United States,* enjoining the order of September 3, 1968, from going into effect or otherwise becoming operative; and (2) the filing on various dates in September and October 1968, of numerous petitions of protestants for reconsideration of the said order of September 3, 1968; and replies thereto by applicant and the Department of Defense; and

It appearing, That the Department of Defense's reply to said petitions has specified additional reasons indicating an immediate and urgent need for applicant's service which cannot be met by existing carriers;

It further appearing, That the additional evidence referred to in the previous paragraph was not a part of the original record to which protestants have had an opportunity to reply; and good cause appearing therefor:

It is ordered, That the proceeding be, and it is hereby, reopened on the Commission's own motion for the purpose of receiving a verified statement from the Department of Defense which shall, to the extent the national defense and security will permit disclosure, specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers.

It is further ordered, That on or before November 20, 1968, applicant shall submit a verified statement from the Department of Defense, including therein the matter set forth in the preceding ordering paragraph.

It is further ordered, That on or before December 6, 1968, protestants may submit verified statements in response to any statement submitted by applicant;

It is further ordered, That all such verified statements submitted shall be served upon all other parties to the proceeding, and each statement shall so certify.

It is further ordered, That in view of the restraining order issued by the Court on October 3, 1968, the order of the Commission, Chairman Tierney dated, October 9, 1968, postponing the effective date of operation of the order entered herein September 3, 1968, be, and it is hereby, continued in effect and American Farm Lines be, and it is hereby, directed not to perform any for hire operations in interstate or foreign commerce pursuant to the Commission's order of September 3, 1968, until further order of the Commission.

It is further ordered, That after expiration of the time period fixed for submission of verified statements the proceeding shall be reconsidered by us on the record as made together with such verified statements as may be filed.

By the Commission, Division 1, Acting as an Appellate Division.

H. NEIL GARSON
Secretary

(SEAL)

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. —

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BLACK BALL FREIGHT SERVICE, INC., ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court is reported at 298 F. Supp. 1006. The orders of the Interstate Commerce Commission are unreported. The above items are reproduced in Appendices A, C, and E to the Jurisdictional Statement filed by American Farm Lines in the companion appeal from the same district court judgment in No. 369, hereinafter referred to as "A.F.L. J.S. App."

JURISDICTION

The judgment of the three-judge court was entered on March 26, 1969. The notice of appeal was filed on

May 26, 1969.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b). *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line R.R. Co.*, 353 U.S. 436 (1957), and *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1.

STATUTES INVOLVED

Primarily involved are Section 210a(a) of the Interstate Commerce Act (49 U.S.C. 310a(a)) and subsections (8) and (9) of the Commission's Temporary Authority Rules (49 C.F.R. 1131.2(c) (8 & 9)). These Rules, as well as the Commission's General Rules of Practice, are set forth in pertinent part in Appendix A hereto. Section 210a(a) of the Act provides, in pertinent part:

> To enable the provision of service for which there is an immediate and urgent need to a point or points within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common or a contract carrier by motor vehicle, as the case may be. * * *

QUESTIONS PRESENTED

An application filed with the Interstate Commerce Commission under Section 210a(a) of the Interstate Commerce Act (49 U.S.C. 310a(a)) sought temporary

[1] Since the sixtieth day after entry of judgment was May 25, 1969, a Sunday, filing of the notice of appeal on the following Monday, May 26, 1969, was timely. See Rule 34(1), Rules of this Court.

authority to perform motor common carrier transportation [2] to meet the imperative need of the Department of Defense for an expedited and flexible single-line irregular-route service in order to discharge its responsibility for conduct of the Nation's defense. When the Commission declined to stay its initial grant of authority pending reconsideration, a single judge of the statutory three-judge district court enjoined operation of the Commission's order. The Commission reopened the proceeding, received additional evidence and concluded to grant the authority since DOD had an immediate and urgent need for the proposed single-line service which no existing carriers were capable of rendering through joint-line operations. The district court, in setting aside the grant of authority, held that the Commission lacked jurisdiction to reopen the proceedings after the court had asserted its judicial review jurisdiction and issued a restraining order staying the initial order of the Commission (A.F.L. J.S. App. A, p. 8a). The district court additionally concluded that, even if the Commission had such jurisdiction, the evidence received would not meet the requirements of categories (8) and (9) of the Commission's Temporary Authority Rule 49 C.F.R. 1131.2(c)(8 & 9) [A.F.L. J.S. App. A, pp. 11a–12a]. Specifically, these rules require that supporting shippers indicate whether efforts have been made to obtain the needed service from existing carriers, and the results of such efforts.[3] [App. A, p. 20]

[2] Of general commodities, including Class A and B explosives, between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the

The questions presented are: (1) Whether the Commission is required, as a matter of law, to reject a temporary authority application under 49 U.S.C. 310a(a) because the supporting shipper's statement did not literally conform to the Commission's Temporary Authority Rules (49 C.F.R. 1131.2(c)(8–9)) even though it contained all information necessary to permit the exercise of the discretionary authority conferred by the statute; and (2) Whether the District Court erred as a matter of law in concluding that the Commission lacked jurisdiction to reopen the administrative proceeding pending before it after proceedings for review of the Commission's initial order had been commenced and the court had stayed that order.

STATEMENT

This appeal concerns the imposition by a district court of strict evidentiary standards for the Inter-

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one hand, and, on the other, points in Washington, California, Nevada, Utah, and Arizona.

[3] DOD, the sole supporting shipper, stated that it imperatively requires service over the most direct routes in a minimum transit time (A.F.L. J.S. App. D, pp. 22a, 28a–29a, 30a–31a); that it has experienced inefficient transportation from existing carriers' circuitous joint-or-multiple-line services which have been deficient for its needs, giving the reasons therefor and examples of excessive times in transit (*ibid.*, pp. 22a–24a, 27a–30a, 31a–32a); that no carrier possesses the complete single-line geographical and commodity authority or service capable of meeting its needs (*ibid.*, pp. 25a–27a, 28a–29a, 31a–32a); and that the proposed service will be used to complement rather than replace existing services (*ibid.*, pp. 31a, 33a). While the protests of existing carriers claimed adequacy of their joint-line services, they substantiated DOD's statement that no carrier possesses the complete authority sought.

state Commerce Commission to follow in exercising its Section 210a(a) authority to award, "in its discretion and without hearings or other proceedings," temporary authority to conduct motor common carrier service for which there is an immediate and urgent need which existing carriers cannot meet. This case arises out of the following undisputed factual situation. For many years DOD was forced to depend upon a motor carrier transportation system which is largely comprised of carriers holding bits and pieces of commodity and geographical authority which must be joined and operated over circuitous regular routes. This system precluded the rendering of expeditious and direct service with its inherent savings in time and money. DOD had no practical choice but to rely entirely on this existing service which impeded its efforts to efficiently and economically procure and distribute the vast quantities of military as well as other supplies which were required for implementation of the Nation's policies related to the national defense.

The situation changed, however, in the latter part of 1966 when American Farm Lines and a number of other agricultural cooperative associations began soliciting DOD traffic for movement pursuant to the exemption from economic regulation provided by Section 203(b)(5) of the Interstate Commerce Act (49 U.S.C. 303(b)(5)). See *N.W. Agricultural Co-op* v. *Interstate Commerce Commission,* 350 F. 2d 252 (9th Cir., 1965, *cert. denied,* 382 U.S. 1011 (1966). Upon using AFL's service, DOD immedi-

ately discovered that it was superior to that available from existing carriers because it regularly provided service over the most direct routes from all points in broad multi-state areas which resulted in precisely timed deliveries and minimization of time in transit.

When injunctions issued by the United States District Court for the Western District of Oklahoma[4] precluded AFL from rendering much of the completely flexible service previously provided, and legislation amending 49 U.S.C. 303(b)(5) limited more drastically the ability of AFL to provide the same flexible service in the future,[5] DOD supported AFL's application for motor carrier temporary authority, and is now supporting a similar application for permanent authority (A.F.L. J.S. App. D, p. 33a).

Upon consideration of the conflicting claims in the reopened proceeding, the Commission found (A.F.L. J.S. App. E, pp. 35a–37a) that DOD, "in discharging its responsibility for the conduct of the Nation's defense, * * * imperatively requires service over the most direct routes in a minimum transit time; that it has experienced inefficient and circuitous joint-line

[4] *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, Civil Action No. 67–487 (W.D. Okla. Feb. 20 and May 28, 1968).

[5] P.L. 90–433 (82 Stat. 448 and 449), July 26, 1968, restricts interstate transportation of cooperative associations for nonmembers "to that which is incidental to its primary transportation operation and necessary for its effective performance and shall in no event exceed 15 per centum of its total interstate transportation services in any fiscal year, measured in terms of tonnage."

transportation by the use of existing carriers' services which have been deficient for its needs, particularly relating to the coordination of the arrival of inbound shipments [of component parts] with the production schedules of manufacturing installations and the departure times and transhipment dates of matters and materials necessary to the national defense." Continuing, the Commission found that DOD "has attempted but has been unable to obtain the required and necessary type of service" from existing carriers; "knows of no carrier in a position to meet its needs" and that the record contains no evidence "to establish that any of the protesting carriers provide a service to meet" the needs of DOD. In granting the authority sought, the Commission concluded that, "in balancing the scales of public interest, it is necessary to assure that the Government's immediate and urgent transportation requirement be met by an expedited and flexible [single-line] service which will be used to complement rather than replace existing services."

The Court held that the Commission lacked jurisdiction, without prior leave of court, to reopen the proceeding to receive additional evidence or take any action which "might nullify or impair the jurisdiction of this court over the ICC [initial] order under review." [A.F.L. J.S. App. A, p. 8a]. The court also held that, in failing to show any efforts by DOD "to obtain from existing carriers the service AFL seeks to provide, or the identity of any existing carriers who failed or refused to provide the needed service

or the reason given for any such failure or refusal," the evidence did not meet the requirements of Temporary Authority Rule 49 C.F.R. 1131.2(c)(8 & 9). In the court's view, the Temporary Authority Rules are mandatory and require full compliance with every provision thereof before the Commission may exercise its authority under 49 U.S.C. 310a(a). [A.F.L. J.S. App. A, p. 11a]. Accordingly, the district court held that each grant of temporary authority was arbitrary, capricious, erroneous in law, null and void and entered a stay order to continue in effect until further order of the court. [A.F.L. J.S. App. A, p. 12a].

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal raises important questions of law which, as decided by the district court, are in conflict with decisions of this Court as well as other lower Federal courts and have significantly impaired the Commission's ability to administer Section 210a(a) effectively in acting upon the large number of applications for temporary authority filed annually.[6] Plenary consideration by this Court is thus warranted.

1. The district court erred in holding that the Commission was required as a matter of law to reject AFL's application because the statement of the supporting shipper did not literally conform to the requirement of the Temporary Authority Rules that shippers indicate whether efforts have been made to obtain the needed service from existing carriers, and

[6] In 1968, over 6,000 applications were filed, see I.C.C. Annual Report 1968, p. 126.

the results of such efforts. In viewing DOD's failure to literally comply with the "mandatory" requirements of this rule as a fatal defect, the district court exalts form over substance and requires the supporting shipper to perform the futile gesture of appealing to existing carriers for service which they do not and can not perform under their franchises.

This Court recently rejected the same contention in affirming a judgment of the District Court for the Eastern District of Virginia in *Estes Express Lines* v. *United States,* 292 F. Supp. 842, affirmed 22 L.Ed. 2d 673. There, as here, the supporting shippers sought a service differing in both kind and quality from that provided by existing carriers. In *Estes,* the district court held that, in light of the record as a whole, items (8) and (9) of the Temporary Authority Rules were "reasonably answered" when each supporting shipper stated that it was currently obtaining the needed service from the Railway Express Agency and had no knowledge of any carrier other than REA that could offer adequate express service (292 F. Supp. at 844). In this case, the district court rejected the more comprehensive statement of DOD (*supra,* p. 4, fn. 3) and deprived the Commission of its jurisdiction to exercise its authority under 49 U.S.C. 310a (a) simply because there was no "full compliance with all mandatory ICC rules." (A.F.L. J.S. App. A, p. 11a).

Whether these Rules are binding on the Commission or merely state general guidelines designed to implement the statute and facilitate the Commission's

handling of applications for temporary authority, they reflect no intention to reduce or relinquish the Commission's statutory power to issue temporary certificates where ample evidence appears in the record. *Roadway Express, Inc.* v. *United States,* 263 F. Supp. 154, 159 (N.D. Ohio, 1966). If permitted to stand, the district court's decision will impose more rigid standards on the grant of temporary authority than the summary procedures envisioned by the statute[7] (49 U.S.C. 310a(a)). So long as there is reasonable compliance with the rules and any evidence in the limited record before it, conflicting though it may be, the statute contemplates that the Commission should remain free to accept the claims of immediate and urgent need for service and may grant temporary authority until it can, after full evidentiary hearing, determine whether permanent authority should be awarded under 49 U.S.C. 307. *Union Cartage Co.* v. *United States,* 244 F. Supp. 1005, 1007 (D. Mass., 1965).

Reasonable rather than literal compliance with rules designed to implement statutory authority[8] is

[7] The courts have consistently held that the test of validity of a temporary authority order is not whether it is supported by substantial evidence, as is the case where an order granting permanent authority is under review, but rather is limited to a determination of whether the Commission has legal authority and any evidence to act as it did in the circumstances presented. *Roadway Exp., Inc.* v. *United States, supra,* at p. 157; *Merchants Delivery Co.* v. *United States,* 265 F. Supp. 669, 671–2 (W.D. Mo., 1967); and *Bert Hussey* v. *United States,* 271 F. Supp. 650, 653–4 (N.D. Calif., 1965).

[8] See Policy Statement of the Commission, dated January 23, 1968, quoted ~~the~~ *Acme Cartage Co.* v. *United States,* 290 F. Supp. 453, 456 n. 4 (W.D. Wash., 1968).

compelled as a practical matter. As another district recently observed, correctly we submit, in *Superior Trucking Co., Inc.* v. *United States,* 1969 Fed. Car. Cases ¶ 82,108 (N.D. Ga., June 3, 1969):

> * * * The regulations were designed to facilitate the Commission's findings of an urgent and unmet need; if facts supporting these findings exist in the record, the fact that the regulations were not strictly followed should be irrelevant. It is particularly inappropriate to strictly bind an agency to regulations made under a statute designed to encourage summary procedures. The Commission's regulations should not be read to impose more rigid standards on the grant of a temporary authority than the summary procedures envisioned by § 310a(a) of the statute. Moreover, the detailed nature of the information requested in subsections (8) and (9) of the regulation would, in effect, require shippers to keep continuous records of every call they made to carriers * * *. This could hardly be expected of shippers, especially when there would be no reason to think in advance that such detailed records would ever be of any use. Of course, it would help the ICC if such data were available, and it is for this reason that they have included such a request in their regulations. But to think that such requests, if not possible of fulfillment, should void a proceeding *ipso facto* would be to effectively eliminate temporary authorities.

This logic applies with equal force in this case where the shipper reasonably answered the require-

ments of the rules and clearly established the inadequacies of existing multiple-line services.[9] Existing carriers' claims of capability to render the needed service present questions of fact for determination by the Commission. Yet, the court below substituted its own view with respect to the merits of conflicting claims and prohibited the body charged by Congress with this duty from making any determination. See *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535–536 (1946). And if, as the decision of the district court implies, existing carriers must be afforded the first opportunity to meet the needs of a shipper on a piecemeal rather than a complete basis, it is clearly wrong since the statutory provisions of 49 U.S.C. 310a(a) do not require automatic denial of authority in such circumstances. *Cf., United States* v. *Dixie Highway Express*, 389 U.S. 409 (1967).

In sum, the district court's holding that there must be full compliance with all mandatory Temporary Authority Rules before the Commission may exercise its discretionary authority under 49 U.S.C. 310a(a) is erroneous and will seriously impede the Commission in providing temporary service to meet urgent shipper needs.

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[9] 49 C.F.R. 1131.4(b)(4) provides that a desire for single-line service is insufficient to grant temporary authority—"a grant * * * to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers * * *." (App. A, p. 21).

2. Although the district court placed major emphasis on the question of full compliance with the Temporary Authority Rules, it additionally held that the Commission lacked jurisdiction to reopen the administrative proceeding because the Court had asserted judicial review jurisdiction and restrained the effectiveness of an initial grant of authority which the Commission had declined to stay pending reconsideration. (A.F.L. J.S. App. A, p. 8a).[10] In so holding, the district court again departed from decisions of this Court, as well as other courts, and misconceived not only the provisions of Section 17(7) and the Commission's Rules of Practice, but also the proper relationship between the courts and the Commission in matters affecting transportation policy. *Cf., United States* v. *Western Pacific R. Co.,* 352 U.S. 59, 63 (1956).

Section 17(7) of the Interstate Commerce Act (49 U.S.C. 17(7)) gives the Commission continuing jurisdiction over its orders and empowers it to rehear or reconsider and to rescind, change or modify them at any time for the purpose of correcting any error or injustice.[11] *Baldwin* v. *Scott County Milling Co.,* 307 U.S.

[10] The district court stated, "[e]ven if ICC had jurisdiction to reopen the ICC proceeding and to consider the [DOD] verified statement, it would not meet the requirements of categories (8) and (9) of ICC Rule 49 C.F.R. 1131.2(c)."

[11] Section 17(7), made applicable to motor carrier matters by 49 U.S.C. 305(h), specifically provides, in pertinent part:

"If after rehearing, reargument, or reconsideration of an * * * order * * * of a division * * * it shall appear that the original * * * order * * * is in any respect unjust or unwarranted,

478, 483–4 (1939); *Sprague* v. *Woll,* 122 F. 2d 128, 130 (7th Cir., 1941), *cert. denied,* 314 U.S. 669; *Davis, Adm. Law Treatise,* Section 18.09, pp. 606 and 610. Indeed, even apart from expressed statutory authority, the power to rehear, reconsider and revise is necessarily inherent in the power to decide if a decision-making body is to be able to effectively carry out the purposes of the statute which it administers. See, *e.g., Confederated Tribes* v. *United States,* 20 Ad. L. 2d 164, 165 (Ct. Clms., 1966). *Albertson* v. *F.C.C.,* 88 F. 2d 397, 399 (D.C. Cir., 1950); *cf., Delta Airlines* v. *C.A.B.,* 280 F. 2d 43, 46–47 (2d Cir., 1960), aff'd 367 U.S. 316 (1961). The cases upholding the Commission's continuing jurisdiction to reopen a proceeding while judicial review actions were pending are legion,[12] some with but most without comment.[13] See, *e.g., Aberdeen & Rockfish R.R.* v. *United States,* 270 F. Supp. 695, 705 (E.D. La., 1967), aff'd as modified on other grounds, 393 U.S. 87 (1968) and *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499. And the same principle has been applied in the case of other departments and agencies of Government.[14] Thus, the district court's judgment conflicts with a consistently applied and well-established principle.

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the Commission or appellate division may reverse, change, or modify the same accordingly * * *." (App. A, p. 19).

Compare Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)) and Section 19 of the Natural Gas Act (15 U.S.C. 717 r) which permit reopening any time prior to filing of the administrative record in the reviewing court.

[12] From 1952 through 1968, there were 65 such cases.

[13] In one case, *Atchison, T. & S.F. Ry. Co.* v. *United States,* 231 F. Supp. 422, 426–429 (N.D. Ill., 1964), the Court criti-

More importantly, both logic and sound policy require that the judgment below be reversed. It was not urged below that the Commission's initial grant of authority was a final order (A.F.L. J.S. App. A pp. 8a, 10a). Rather, it was correctly pointed out that when the Commission declined to stay the effectiveness of its initial grant of authority pending rehearing and reconsideration,[15] the district court had juris-

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cized the Commission for reopening while a judicial review action was pending because of possible inconvenience to the judges and a denial of due process. On the facts of the case, however, the court held that lack of a prior request or notice to the court was not sufficient to void the reopening, particularly where there was no prejudice.

[14] *Donaldson* v. *Read Magazine*, 333 U.S. 178, 182–4 (1948), involving a fraud order issued by the Postmaster General; *Evans* v. *F.C.C.*, 113 F. 2d 166, 169 (D.C. Cir., 1940); *Frontier Airlines, Inc.* v. *C.A.B.*, 259 F. 2d 808 (D.C. Cir., 1958); *Anchor Line* v. *F.M.C.*, 299 F. 2d 124, 125 (D.C. Cir., 1962).

[15] The district court is clearly wrong in holding (1) that petitions for reconsideration are not authorized by Rule 49 C.F.R. 1131.6 and (2) that the September order of the Commission was administratively final by virtue of Rule 49 C.F.R. 1100.101(a)(2). (A.F.L. J.S. App. A, p. 9a). Rule 1131.6 specifically states that the right to file petitions are "pursuant to and in accordance with the Commission's General and Special Rules of Practice." The General and Special Rules provide that the General Rules apply "to the procedures of all employee boards" and in all proceedings "unless otherwise directed." (App. A, pp. 21, 22). Thus, the applicable Rule is 49 C.F.R. 1100.101(g) (App. A, p. 22), which requires filing of a petition where the Appellate Division reverses, changes, or modifies an order of a board of employes. Moreover, the term "officer" as used in subsection 101(a)(2) is not limited to officers holding oral hearings as the court seems to suggest, but is defined by 49 C.F.R. 1100.5(f) to include "a Commission, a board of employees * * *, an examiner, or special board composed of State representatives (called a "joint board") in this part * * *."

diction to issue a temporary restraint to prevent irreparable injury pending final agency action. *Pacific Inland Tariff Bureau* v. *United States,* 129 F. Supp. 472, 478 (D. Oregon, 1955); *Covington* v. *Schwartz,* 230 F. Supp. 249, modified on other grounds, 341 F. 2d 537, 539 (9th Cir., 1965); *Cantlay & Tonzola* v. *United States,* 115 F. Supp. 72, 76 (S.D. Calif., 1953). Usually in such circumstances, the reviewing court will hold the judicial action in abeyance. While the agency should, as here (A.F.L. J.S. App. A, pp. 4a-5a), notify the court of reopening and request a stay, it is not essential to seek court consent to reopen in the absence of prejudice to the parties. *Anchor Line Ltd.* v. *F.M.C.,* 299 F. 2d 124, 125 (D.C. Cir. 1962). Here, no prejudice occurred. The Commission reopened to receive evidence relevant to the deficiencies found to exist by the court below in restraining the initial grant of authority. [A.F.L. J.S. App. F, p. 39a]. No one has a vested right to preserve an error if the agency wishes to correct the error and there is an opportunity for judicial review of its final corrective action. *Wrather-Alvarez Broadcasting* v. *F.C.C.,* 248 F. 2d 646, 648 (D.C. Cir., 1957); and *Frontier Airlines, Inc.* v. *C.A.B.,* 259 F. 2d 808 (D.C. Cir, 1958). Self cor-

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[A.F.L. J.S. App. A, p. 9a]. Reliance by the district court on *Transamerican Freight Lines* v. *United States*, 258 F. Supp. 910, 915 (D. Del., 1966) is inapposite. The Commission has declined to follow the *obiter dictum* of that decision, which was expressed *sua sponte* and totally unnecessary to the holding of the case, and has been sustained in doing so in *Resort Bus Lines* v. *United States*, 264 F. Supp. 742, 745 (S.D. N.Y., 1967). Thus, the judgment below presents another conflict on an issue of law among the lower Federal courts.

rection of its own errors without the necessity for a reviewing court to remand an order to the Commission for this purpose should be the aim of a well-run administrative agency. *Alamo Exp., Inc.* v. *United States,* 239 F. Supp. 694, 698 (W.D. Tex., 1965), aff'd 382 U.S. 19 (1965).

In the circumstances of this case, the court below erred in limiting the Commission's statutory authority to reopen the proceeding in order to provide a more detailed rationale for its decision in light of additional evidence received.

CONCLUSION

The district court has interpreted Sections 17(7) and 210a(a) and the regulations implementing those provisions so as to seriously impair the Commission's power effectively to dispose of applications for temporary authority. This appeal thus presents substantial questions in the administration of the Interstate Commerce Act and probable jurisdiction should be noted.

Respectfully submitted.

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JULY 1969.

APPENDIX A

The Statutes

49 U.S.C. 17(7) provides:

> If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

The Temporary Authority Rules

49 C.F.R. 1131.2(c) provides:

> *Supporting statements.* Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shippers' statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such

supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the car-

rier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

49 C.F.R. 1131.4(b)(4) provides:

Single-line service. Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

49 C.F.R. 1131.6 (a) and (c) provide:

(a) *Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person.

(c) *Petitions for reconsideration.* The filing of a petition for reconsideration of an order of Division 1 or the Temporary Authorities Board does not have the effect of automatically staying such order, and the grantee carrier may conduct the operations authorized by such order upon compliance with its tariff, insurance, and other requirements for the duration of the temporary authority, or until otherwise ordered.

RULES OF PRACTICE

49 C.F.R. 1100.1 provides:

SCOPE OF RULES (RULE 1)

The rules in this part govern procedure before the Interstate Commerce Commission in proceedings under the Interstate Commerce Act and related acts, unless otherwise directed by the Commission in any proceeding.

49 C.F.R. 1100.5(f) provides:

> The term "officer," except as a different meaning is indicated in Rules 17(b), 57 to 66, inclusive, 71(a) and 78 (civil and corporate functionaries), includes: (1) a Commissioner, a board of employees (called an "employee board" in this part), an examiner, or special board composed of State representatives (called a "joint board" in this part), to which a proceeding (called "referred matter" in this part) is by order assigned or referred for hearing, consideration, or recommendation of an appropriate order thereon pursuant to provisions of law;[1] and (2) a Commissioner, an examiner, or other Commission employee before whom, without entry of an order of reference, a proceeding is assigned for hearing. The term "board" means either an employee board or a joint board as the context requires.

49 C.F.R. 1100.101(g) provides:

> *Petitions for reconsideration of appellate division decisions on review of board decisions.* When an appellate division has denied a petition seeking a reversal, change, or modification of a determination whether original or on review by a board of employees, any further petition for reconsideration by the same party or

[1] Such as sections 17 and 205 of the Interstate Commerce Act.

> parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (e) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition.

49 C.F.R. 1100.225 prescribes "Special rules of practice governing the procedure of the Temporary Authorities Board" and other employee boards. In a footnote to the title of these special rules, it is provided that:

> The general rules of practice apply to the procedure of all employee boards except to the extent specifically provided for in Rules 200 and 225.

U.S. GOVERNMENT PRINTING OFFICE: 1969

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, APPELLANT

v.

BLACK BALL FREIGHT SERVICE, ET AL.

No. 382

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BLACK BALL FREIGHT SERVICE, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES

These are appeals from a final order of a three-judge court setting aside successive orders of the Interstate Commerce Commission granting the application of American Farm Lines for temporary authority to provide certain motor service for the Department of Defense. American Farm Lines is the appellant in No. 369; the Commission is the appellant in No. 382. The United States supported the Com-

mission in the court below, but did not appeal and accordingly is an appellee in each case in this Court.

Although the United States has not considered the issues involved in these cases of sufficient importance to warrant its seeking plenary consideration by this Court, it agrees that the decision of the court below is erroneous and will support the Commission's position if probable jurisdiction is noted and the cases are set for argument. Specifically, we agree with the Commission that the record justified the grant of temporary authority and that there was reasonable compliance with the applicable Commission rules. *Estes Express Lines* v. *United States,* 292 F. Supp. 842 (E.D. Va.), affirmed, 394 U.S. 718. We further agree that the Commission had jurisdiction to supplement the administrative record notwithstanding the commencement of the judicial review proceeding; the Commission's further action was not inconsistent with the jurisdiction of the district court and caused no prejudice to any party. *Inland Steel Co.* v. *United States,* 306 U.S. 153, 159–160; *Anchor Line Ltd.* v. *Federal Maritime Commission,* 299 F. 2d 124 (C.A.D.C.), certiorari denied, 370 U.S. 922.

For the foregoing reasons, the United States does not oppose the appellants' requests that probable jurisdiction be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1969.

360-586—69

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*

v.

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INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees*

On Appeal From the United States District Court for the Western District of Washington

MOTION OF RAILROAD APPELLEES TO AFFIRM

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INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees*

On Appeal From the United States District Court for the Western District of Washington

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MOTION OF RAILROAD APPELLEES TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the appellees listed in Appendix A hereto move that this Court affirm the judgment of the District Court on the ground that the judgment is so clearly correct that plenary review of this Court is not warranted.

QUESTIONS PRESENTED

These appellees believe that the questions presented are the following:

1. Does the Interstate Commerce Commission have the power under 49 U.S.C. 310a(a) to grant temporary authority where neither of the two conditions imposed by the statute has been shown to exist, especially where the sole supporting shipper acknowledges there is already sufficient and satisfactory service?

2. Does the Interstate Commerce Commission have the power to grant an application for temporary authority where admittedly the minimum standards of proof required by its own rules and regulations implementing 49 U.S.C. 310a(a) have not been met?

3. Did the Interstate Commerce Commission have authority to reassert its jurisdiction and reopen its proceeding as to precisely the same issue as was being judicially reviewed without obtaining leave of the court, especially where the Commission's opposed motion for stay was never called up for hearing?

STATEMENT

The Opinion of the District Court furnishes a concise, complete and accurate statement of the case. See AFL J.S. 2a-8a. These appellees hereby adopt it.

The Statements of appellants in some particulars go beyond the record and in others fail to give full details. Also, significant facts are ignored.

The asserted agrarian background of American Farm

Lines was not developed on the record.[1] Nevertheless, it is here claimed that the government traffic is incidental and necessary to the transportation of member traffic and is essential to sustain the farm-related function. It is further urged that American Farm Line's existence as an agricultural cooperative carrier was threatened by the impending loss of the government hauling by reason of the amendment to the agricultural cooperative partial exemption, 49 U.S.C. 303(b)(5), and of two injunctions issued by the District Court for the Western District of Oklahoma. If these alleged facts have any place in this appeal, they should be considered in the light of those which follow.

As shown in Appendices B and C hereto,[2] American Farm Lines and its general manager have been held to be in contemptuous violation of that court's orders. Appellant Interstate Commerce Commission, interestingly enough, participated as an intervening plaintiff in each proceeding, successfully moving for summary judgment in one. In the contempt proceeding the court found, among other things:

1. In a substantial number of instances, American Farm Lines' handling of government traffic was not incidental and necessary to its farm-related transportation, even under the tests laid down in the *Northwest* case;[3]

---

[1] Until American Farm Lines applied to the District Court for stay of its order pending appeal, there was no suggestion that it intended to assume common carrier status and at the same time, with the same equipment, operate under the agricultural cooperative exemption. The questionable legality of such a proposal thus was not at issue.

[2] Findings of Fact and Conclusions of Law, filed July 24, 1969, and Judgment filed July 31, 1969 respectively, in *Munitions Carriers Conference, et al.* v. *American Farm Lines, et al.*, Civil Nos. 67-487 and 68-148 in the United States District Court for the Western District of Oklahoma.

[3] *Northwest Agricultural Cooperative Ass'n.* v. *I.C.C.*, 350 F.2d 252 (1965), *cert. denied*, 382 U.S. 1011 (1966).

2. Government, not cooperative membership hauling, is its first concern;

3. Westbound government shipments are unlawful and in contravention of the court's orders in that the involved vehicles were not proceeding westward to pick up farm-related loads;

4. In its attempt to circumvent the letter of the injunctions, American Farm Lines hauls grain for a member at a rate which realizes only half of its out-of-pocket operating costs. Further, its eastbound member traffic realizes only from 19 to 26 cents while its operating costs approximate 45 cents per mile;

5. During an involved two-month period, American Farm Line's government revenues were 72.3% of total revenues. In a ten-month period (during the last five months of which American Farm Lines was under one or both injunctions) its membership traffic remained constant while government traffic and equipment supply about trebled;

6. In spite of American Farm Line's protestations that its biggest problem is lack of equipment for west coast members, it dispatches eastbound government loads from the west coast. Further, it often bypasses California members with empty equipment on the way to pick up government loads; and,

7. American Farm Lines is in the general trucking business for the government beyond the limit allowed by law.

The two injunctions have been sustained by the United States Court of Appeals, Tenth Circuit. See Opinion filed July 30, 1969 in *Munitions Carriers Conference, Inc., et al.*

v. *American Farm Lines,* Nos. 10177 and 10178, attached hereto as Appendix D.

The above facts would seem to refute American Farm Lines' premise (AFL J.S. 16) that a practical effect of the lower court's judgment is to frustrate its efforts to *continue* to provide *lawful service* for nonmembers.

Alleged overwhelming evidence of *immediate and urgent need* of the proposed service is stressed in appellants' Statements. But, this Court was not informed that the sole supporting shipper advised American Farm Lines[4] that

> "• • • In many instances the Department of Defense receives direct through service from American Farm Lines, Inc. which is desirable. In other words, the Department of Defense would like to retain this transportation source which has been available to it. However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines."

Further, neither Statement makes mention of the unchallenged findings of the District Court (1) that the Interstate Commerce Commission in both its answer and brief conceded that its order of September 3, 1968 "may not have been based upon evidence to support" its conclusion, (2) that the administrative finality of that order was unchallenged, (3) that the Commission, by its order of October 9, 1968 recognized the stay order of the lower court, and (4) that it did not call up its opposed motion requesting stay of the lower court's temporary restraining order.

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[4] See Exhibit C to Complaint to Set Aside and Annul an Order of the Interstate Commerce Commission filed in the lower court on September 26, 1968, attached hereto as Appendix E.

ARGUMENT

The District Court decided this case on three alternative grounds.

1. The Interstate Commerce Commission has neither power nor discretion to grant a temporary authority application in the absence of a showing that both conditions specified in 49 U.S.C. 310a(a) exist;

2. The Interstate Commerce Commission may not grant a temporary authority application unless compliance is made with its rules and regulations set forth in *Ex Parte No. MC-67, Motor Carrier Temporary Authorities,* 98 M.C.C. 483, 49 C.F.R. 1131, et seq. governing the filing, processing and determination of such applications and prescribing minimum evidentiary and procedural standards.

3. The Interstate Commerce Commission had no authority, even under its own rules of procedure, to reassert its jurisdiction and reopen its proceeding as to precisely the same issue as was being reviewed by the District Court without obtaining leave of the court to do so, especially in view of the fact that the Interstate Commerce Commission's motion for stay, which was opposed, was never called up.

While these appellees firmly believe that the District Court's alternative ground herein numbered 3 is legally and factually correct, they here, without waiving the point, take the position that its resolution is unnecessary. For, whether considered separately or together, the initial supporting Statement (underlying the order which the Commission concedes "may not have been based upon evidence to support its conclusions") and the Caputo statement fail to satisfy either of the two conditions imposed by the underlying statute and further fail to satisfy many of the Commission's minimum standards of proof necessary for a grant of authority.

1. The Purported Support Of The Application Fails To Satisfy Either Of The Two Conditions Imposed By The Statute.

Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a), provides that the Interstate Commerce Commission, in its discretion, may grant temporary authority to enable the provision of service when both of two conditions are shown to exist. First, there must be an immediate and urgent need for service, and second, the point or points involved must be without carrier service capable of meeting such need.

The broad discretionary powers relied upon so heavily by appellants do not exist, for neither of the two statutory conditions has been satisfied.

The supporting statements emphasize again and again the shipper's desire to have one single-line, irregular-route, complete-service, trucker to operate between every conceivable set of points in two exceedingly large areas. This type of service is felt to be preferable to that collectively provided by the numerous existing carriers.

It should be borne in mind that the original act to regulate motor carriers made no provision for issuance of temporary authority, and that 49 U.S.C. 310a(a) was enacted pursuant to the Interstate Commerce Commission's request to Congress for authority to deal with emergency situations. In a letter to both houses on February 25, 1938, the Commission's chairman requested authority (Sen. Doc. No. 154, 75th Cong., 3rd Series, pp. 2-3), "to grant temporary operating to meet an emergency" because:

> "Cases arise, and have been brought to our attention, where *urgent need* for interstate motor carrier service *suddenly develops.* The *bringing in of oil wells in a new field* and conditions created by a flood or other *calamitous visitation* are good examples, and there are others." (Emphasis added)

Desire and preference for a complete, single-line service, is one thing. A sudden emergency need of it is another.

Neither supporting statement in the instant proceeding gives more than general conclusions. Both lack specifics. The Interstate Commerce Commission has often held that even as to applications for *permanent* authority general, unspecific statements of supporting shippers expressing a preference for single-line service are insufficient to establish need. In *Hancock Trucking, Inc., Extension Gulf and West Coast Routes,* 62 M.C.C. 513 (1954) the entire Commission said at Page 535:

> "**** We recognize, of course, that any single-line motor service between distant points has a number of potential advantages and fewer operational problems than interchange service as it now exists between the same points. In fact, the support of some of applicant's shipper witnesses is based largely on the single proposition that, to the disregard of other considerations, the advantages of single-line service should be made available to them. To the extent that this one factor dominates their support, we need comment no further than to say that the national transportation policy does not tolerate the thought that all shippers and all points are entitled to single-line motor-carrier service."

In a recent case, the Commission's Division 1 denied twenty-two applications principally on the ground that the *desired* single-line service had not shown to be *needed.* In *Cushman Motor Delivery Company, Extension, Iron and Steel,* 106 M.C.C. 809 (1968). Division 1 reaffirmed the principle that inter-line service is not bad *per se.* The Division stated at page 809:

> "**** The general statement of shippers are unconvincing that the presently used interline services result in unreasonable delays that warrant the granting of the authority sought. Interline service between two, or

> even among three carriers particularly to distant points in Wisconsin and the Upper Peninsula cannot be said to be inadequate *per se. Ayer* v. *United States,* 139 F. Supp. 440 (1956) and *Colorado-Arizona-California Express* v. *United States,* 224 F. Supp. 894 (1963). ***"

As its language makes clear, 49 U.S.C. 310a(a) was enacted to *enable the provision of service.* There must be an *immediate* need for the provision of service, and an *urgent* need for the provision of service. The point or points involved must be without carrier service capable of meeting such immediate or urgent need.

Admittedly, there is a lot of service in the involved territories. And, while the Department of Defense frankly advised American Farm Lines that its service is *desirable,* it cannot be said that there would be *insufficient* or *inadequate* service without it. The Department, as above shown, stated:

> *** In many instances the Department of Defense receives direct through service from American Farm Lines, Inc. which is desirable. In other words, the Department of Defense would like to retain this transportation source which has been available to it. However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines."

The application concededly was not supported to enable the provision of service. Service—sufficient service, adequate service—is already there. There can be no immediate or urgent need of service when the existing transportation system admittedly is sufficient and adequate. Accordingly, the lower court made the following finding (AFL J.S. 6a) which remains *unchallenged*:

> "*** The ICC also had before it a letter dated April 30, 1968 written to the president of AFL wherein the Department of Defense stated it was not in a position

> to verify that there would be insufficient or inadequate service to meet Department requirements in the absence of the single-line service AFL seeks to provide."

American Farm Lines and its supporter wholly failed to establish that the two statutory conditions exist. Thus, the Commission had no discretion in the matter. Its purported grant was a nullity and the court clearly was correct in so holding.

2. The Purported Support Of The Application Fails To Satisfy The Commission's Rules Prescribing Minimum Evidentiary And Procedural Standards.

Regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and this principle, which applies to the Interstate Commerce Commission, holds even when the considered administrative action is discretionary in nature. *Service* v. *Dulles*, 354 U.S. 363; U.S. ex rel. *Accardi* v. *Shaughnessy*, 347 U.S. 260. *Atwood's Transport Lines* v. *U.S.*, 211 F. Supp. 168, 170, affirmed per cur., 373 U.S. 377, is a case involving the validity of a rule of the Interstate Commerce Commission applicable to motor carriers of passengers. It was there held:

> "Rules and regulations promulgated by by Governmental establishments pursuant to statutory authority have the force and effect of law, and concededly are subject to the same tests as statutes. ***"

Under the authority of 49 U.S.C. 204(a)(6), the Interstate Commerce Commission adopted temporary authority rules and regulations effective July 5, 1965. *Ex Parte No. MC-67, Motor Carrier Temporary Authorities*, 98 M.C.C. 483, 49 C.F.R. 1131 et seq.

Appellants make no claim that the purported support of the application satisfies the standards and minimum

requirements prescribed in those rules. Rather, they urge that they are merely guidelines to facilitate consideration, that literal compliance is not required, that here compliance would amount to a useless act, that the Commission cannot make rules which reduce or relinquish its statutory duties, and, that in any event, its broad discretionary powers give it full leeway.

Those contentions have been renounced by the Commission itself.

At Page 39 of the *Seventy-ninth Annual Report of the Interstate Commerce Commission,* it was stated:

> "*** The rules *require* more complete information to be furnished by carriers and shippers, and set forth *minimum standards of proof necessary for a grant of authority.* ***" (Emphasis added)

The avowed purpose of the rule-making proceeding was to determine whether rules should be prescribed to *govern* the filing, processing and determination of applications. 98 M.C.C. at 483. Rule 240.2(c), at page 486, provides that applicants *must* be accompanied by a supporting statement, *must* be signed, *must* contain a certification of its accuracy, and *must* contain *at least* the information elicited in subparagraphs (1)-(11).

On July 23, 1968 the Commission issued a policy release[5] in which it was stated:

> "Requests for temporary authority to conduct regulated motor carrier service will be *turned down* if the applications do not adequately comply with Interstate Commerce Commission rules. * * *"

* * *

---

[5] See footnote 4 to *Acme Cartage Co.* v. *U. S.*, 290 F. Supp. 453.

> "Because of 'slip-shod' preparation of many of the applications, the Division frequently has found it difficult to reach an informed and equitable decision. Further investigation by the ICC staff often has been required in order to obtain necessary information. Foremost among the complaints in this area are those concerning failure of the applicant or his representative to submit supporting statements which contain all of the information required by Section 240.2(c) of the Temporary Authority Rules. These rules are set forth in *Ex Parte No. MC 67, Motor Carrier Temporary Authorities,* 98 M.C.C. 483, and 49 CFR 1131 (formerly 49 CFR 340). * * *" (Emphasis supplied.)

In its report to Congress, in its rules, and in its policy statement, appellant Interstate Commerce Commission has made it clear that its implementing rules set forth minimum standards of proof which must be observed.

The Commission is authorized by law to promulgate implementing rules. It did so in the manner and form required by the Administrative Procedure Act. The adopted rules have the same force and effect, and are subject to the same tests, as statutes. In part, they provide (emphasis added):

> "240.2(c) *Supporting statements.*—Each application for temporary authority *must* be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense *must* contain a certification of its accuracy and *must* be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any

such supporting statement *must* contain *at least* the following information:

• • •

"(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

"(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

• • •

"240.4(b)(2) *Immediate and urgent need.*—An immediate and urgent need justifying a grant of temporary authority will be determined to exist *only* where it is established that there is or soon will be an *immediate* transportation need which *reasonably* cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, *failure of existing carriers to provide service,* or comparable situations which *require* new motor carrier service before an application for permanent authority can be filed and processed.

• • •

"240.4(b)(4) *Single-line* service.—Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service *will not warant* a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized *only* when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

• • •

240.4(b)(6) *Failure to provide equipment.*—Temporary authority may be granted where existing author-

> ized carriers *are unable or refuse to furnish equipment* necessary to move passengers or the traffic of shippers in order to meet an immediate and urgent transportation need."

Neither the supporting statements nor any other part of the record gives the *minimum* information which *must* be supplied. As example, it is conceded that the requirements of (8) and (9) above were ignored. The record contains only generalizations and conclusions. The lack of required specificity deprived appellees of due process, for they were not informed where, why, or when they allegedly failed or refused to serve. The allegation that appellees have not been prejudiced by the wanton disregard of the rules is untrue.

Further, it is clear that the Interstate Commerce Commission ignored its own standards governing determination of applications.

In its implementing rules, the Commission has interpreted the statutory condition "immediate and urgent" consistently with the plain language of the pertinent statute and its legislative history. The desires and preferences of the Department of Defense do not constitute a suddenly developed immediate and urgent need as contemplated either by the statute or the rules. No urgency or emergency is claimed. It is not enough to say that it would be a useless act to supply required information because it is well known that no one carrier is authorized to give the complete, single-line service desired, for, as seen, neither the National Transportation Policy, the underlying statute, nor the rules contemplates such a service. As in the case of permanent authority applications, the mere desire for single-line service fails sufficiently to support temporary applications. Moreover, there is no allegation that existing

authorized carriers are unable to furnish or refuse to furnish equipment.

That the Commission's standards for determination have been flouted is made doubly clear by the shipper's admission that the existing authorized carriers render sufficient and adequate service.

Appellants rely upon three decisions to support their contentions that the rules may be disregarded. In *Roadway*[6] no question relating to the rules was raised before the Commission, and the reviewing court deemed the point to be waived. In *Estes*,[7] the decision in *Acme Cartage Co. v. U.S.*, 290 F. Supp. 453, which was relied upon in great measure by the lower court in the instant proceeding, was distinguished on the facts. In *Superior*,[8] both *Acme* and the instant case were distinguished on the facts. These cases do not help appellants.

The rules have the force and effect, and are subject to the same tests, as statutes. They are not mere guidelines. As shown, literal compliance is not a useless act. This is especially true where, as here, appellees have been prejudiced by noncompliance. The Commission's suggestion in its Jurisdictional Statement that it may have reduced or relinquished its statutory duties by adopting the involved rules does not square with the language of the controlling statute, its legislative history, the Commission's report to Congress, its policy release, or its order enacting the rules.

The lower court's holding that the Commission erred in disregarding and violating its governing rules and regulations clearly is correct.

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[6] *Roadway Express, Inc.* v. *U.S.*, 263 F. Supp. 154.

[7] *Estes Express Lines* v. *U.S.* 292 F. Supp. 842, affirmed per cur., 392 U.S. 718.

[8] *Superior Trucking Co.* v. *U.S.*, 1969 CCH Fed. Car. Cas. ¶ 82108.

CONCLUSION

The two supporting statements, whether considered singly or in concert, fail to satisfy (1) either of the two conditions imposed by 49 U.S.C. 310a(a), or (2) the implementing rules and regulations. It is thus beside the point whether the Commission had the power to issue the purpoted second order.

Respectfully submitted,

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Of Counsel:

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August, 1969

CERTIFICATE OF SERVICE

I, Ed White, a member of the Bar of this Court, hereby certify that copies of the foregoing Motion of Railroad Appellees to Affirm has been served by me this 21st day of August, 1969 on all parties required to be served by mailing copies thereof by air mail, postage prepaid as follows:

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.....
Ed White

APPENDIX A

NAMES OF RAILROAD APPELLEES

The Atchison, Topeka and Santa Fe Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago and North Western Railway Company
Chicago, Burlington and Quincy Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Colorado and Southern Railway Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Fort Dodge, Des Moines and Southern Railway Company
Fort Worth and Denver Railway Company
Great Northern Railway Company
Green Bay and Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Illinois Terminal Railroad Company
The Kansas City Southern Railway Company
Missouri-Kansas-Texas Railroad
Missouri Pacific Railroad Company
Norfolk and Western Railway Company
Northern Pacific Railway
St. Louis-San Francisco Railway Company
Soo Line Railroad Company
The Texas and Pacific Railway Company
Toledo, Peoria and Western Railroad Company
Union Pacific Railroad
Waterloo Railroad

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Filed July 24, 1969, Vera L. Howard, Clerk, U.S. District Court, by Zeta M. Cowan, Deputy.

MUNITIONS CARRIERS CONFERENCE, INC.;
CONSOLIDATED FREIGHTWAYS;
PACIFIC INTERMOUNTAIN EXPRESS;
RISS & COMPANY, INC.;
TRI-STATE MOTOR TRANSIT COMPANY;
ILLINOIS CALIFORNIA EXPRESS, INC.;
RINGSBY TRUCK LINES, INC., and
IML FREIGHT, INC.,
Plaintiffs,

vs.

AMERICAN FARM LINES,
a Cooperative Marketing Association;
HOWARD McCORMACK and
E. E. STROHFIELD,
Defendants,

INTERSTATE COMMERCE COMMISSION
Inv. Plaintiff.

Civil No. 68-148

* * *

Grey W. Satterfield of the firm Franklin, Harmon & Satterfield, Oklahoma City, Oklahoma, for Plaintiffs

Harry F. Horak and J. F. Walker, Interstate Commerce Commission, Ft. Worth, Texas, and Bernard A. Gould, Interstate Commerce Commission, Washington, D. C., for Intervening Plaintiff

James M. Robinson and William L. Peterson, Jr., of the firm Hanson, Fisher, Tumilty, Peterson & Tompkins, Oklahoma City, Okla., for Defendants

* * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before, LUTHER B. EUBANKS, United States District Judge

FINDINGS OF FACT

The plaintiffs herein filed on April 9, 1969, a Petition for an order to show cause why disobedient parties should not be punished for civil contempt with respect to the permanent injunction entered in this cause on May 28, 1968. An order to show cause was entered hereon on April 9, 1969, and duly served upon each of the defendants.

Hearing was held before the Court on May 26 through May 29, 1969, at Oklahoma City, Oklahoma, with the plaintiffs appearing by their attorneys, Ben Franklin and Grey W. Satterfield, defendants by their attorneys, James M. Robinson, William L. Peterson, Jr., and Raymond E. Tompkins, and the intervenor by its attorney, Harry F. Horak. The Court, in reaching its conclusions, has considered the pleadings, evidence, stipulations, and arguments of counsel.

The pertinent ordering portion of the permanent injunction of May 28, 1968, reads as follows:

> It is further ordered, adjudged and decreed that Plaintiffs' Motion for Summary Judgment should be, and the same is hereby sustained and that defendants, American Farm Lines, Howard McCormack, and E. E. Strohfield, and defendants' other officers, agents, employees and representatives should be, and the same are hereby permanently enjoined from the for-hire transportation in interstate or foreign commerce of any products other than those products mentioned in Section 1141j of Title 12 U.S. Code, except under one of the following circumstances:
>
> (a) When proceeding to pick up and transport a shipment of products contemplated by Section 1141j of Title 12, U.S. Code when necessary to prevent proceeding with an empty vehicle movement.
>
> (b) When returning from the delivery of a shipment of products contemplated by Section 1141j of Title 12,

U.S. Code when necessary to prevent an empty vehicle movement.

Said injunction shall remain in full force and effect until such time, if at all, as there is in force with respect to said defendants, appropriate authority from the Interstate Commerce Commission authorizing them to engage in such operations.

A companion cause with the same parties was determined by this Court in No. 67-487 Civil, and the record therein was incorporated in the instant action in No. 68-148 Civil.

Oral and documentary evidence was adduced. Six different types of motor transportation by defendant American Farm Lines in interstate commerce were outlined and described by the plaintiffs in their evidence as being in contravention of the above-quoted injunction. Contra evidence and exhibits were proffered by the defendants to show compliance therewith. Each type of operation will be discussed in this opinion.

The first deals with operations termed by the plaintiffs as "long layover" counts and are represented by Exhibits 28 through 48. Generally, these involve a westbound shipment of explosives moving on a Government bill of lading and an eastbound shipment of canned goods for a member of American Farm Lines. For example, in Exhibit 33, a Government shipment of explosives was transported from Crane, Indiana, to Bangor, Washington, arriving at the latter point at midnight on November 19, 1968. The vehicles, Tractor 627 and Trailer V773, and driver laid over at Bangor for unloading for 157½ hours until November 26. The same vehicles and driver then deadheaded empty for 885 miles to Modesto, California, where they again laid over, awaiting a member load, for 174½ hours until December 4 before proceeding eastward to Omaha, Nebraska.

Another example is Exhibit 29 wherein a Government explosive load was transported from Oklahoma City, Oklahoma, to Concord, California, where it laid over 79 hours, then deadheaded empty for 80 miles to Stockton, California, where another layover of 64 hours occurred and then a member shipment was transported to Oklahoma City. This round trip was made in the period from November 17 to 27, 1968. It is plaintiffs' contention that these layovers evidence a violation of the injunction because defendant American Farm Lines could not have been proceeding westbound with the Government shipment with the intention to pick up and transport a specific member shipment on the west coast. Defendants' evidence and exhibits indicate that most of these layovers occurred about and during the Thanksgiving weekend when its members' plants were closed. It appears, however, from the testimony of Don Landrum, dispatcher for American at Oklahoma City, that the westbound Government loads are not dispatched for the purpose of picking up specific member loads on the west coast. His testimony was that the vehicle transporting the westbound Government load is not available for further dispatch until the Government shipment is unloaded. The Court concludes that the westbound shipments on Government bills of lading are unlawful and in contravention of the injunction of this Court because the vehicles were not proceeding to pick up and transport a shipment of products contemplated by the injunction and Section 1141j of Title 12, U.S. Code. In addition, the Court is of the opinion that the Government shipments to Bangor, Washington, as described in Exhibit 33, are unlawful and in violation of the injunction for the further reason, as defendants well knew, that it was never contemplated by this Court that the defendants could carry Government freight ostensibly on a trip to pick up a member load when the member load was 800 miles away from

the destination of the Government freight. Other instances of similar Government shipments to Bangor and eastbound member shipments from the California Bay area are reflected in Exhibits 7, 28, 33, 34, 36, 37, 40, 41, 42, 45, 47, D1-21-A, D1-25-A, D1-26-A, D1-27-A, D3-4-B, D3-12-B, D3-15-B, D3-16-A, D3-17-D, D3-18-A, and D3-18-C. Two additional round trips involving Government shipments to Bangor and member moves on return from California were testified to by Allen M. Crosby and David Loftin in their respective depositions.

The second type of transportation by defendant American Farm Lines are called "sandwich" moves by the plaintiffs. These are documented in Exhibits 2, 5, 7, 11, 12, and 49 through 55. Typical is Exhibit 2 wherein American transported Government traffic from Joliet, Illinois, to Hill Airforce Base, Utah, thence moved a load of grain from Nephi, Utah, to Brawley, California, for member Farmers Grain Cooperative, and thence a Government shipment from Norton Airforce Base, California, to Lake City, Missouri. Plaintiffs contend that this round trip constitutes, in fact, back-to-back movements of Government traffic within the purview of the injunction and that the sandwiched movement of grain is a subterfuge to defeat the prohibitions of the injunction. Defendants contend that it is a bona fide member movement with Farmers Grain Cooperative having become a member of American Farm Lines in July, 1968, and that it avoids the otherwise deadhead miles from Utah to California if it did not have this haul. The Court finds with respect to the round trip in Exhibit 2, discussed above, that the Government haul from Joliet to Hill Airforce Base produced transportation revenue of $1,817.47, the member grain haul from Utah to California brought in $150.00, and the Government haul from California to Missouri produced $694.00. Thus, on this round trip, Govern-

ment revenue totaled $2,511.47 whereas membership revenue was merely $150.00. From a mileage standpoint the grain haul from Nephi to Brawley was 833 miles. Deadhead empty miles because of this grain haul were 30 miles from Hill Airforce Base to Ogden, 280 miles from Brawley to Norton Airforce Base, for a total of 310 miles. Out-of-pocket expense per mile of operation was testified to be 45 cents. It was also testified that the deadhead miles from Utah to California without the grain haul was 808 miles. Mathematical computations thus indicate that the cost to American without the grain haul would have been $363.60, whereas the cost to it with the grain haul is $364.35. These figures will vary in each instance depending upon the origin and destination of the Government shipments, but the question arises—how does this grain haul benefit American other than to sandwich a member haul between two Government shipments on the same round trip? The next question is whether the Government hauls meet the necessary and incidental tests of *Northwest Agricultural Cooperative Association* vs. *Interstate Commerce Commission*, 350 F.2d 252, wherein it was stated:

> • • • on the uncontradicted facts Northwest's transportation of nonfarm products and supplies was incidental and necessary to its farm-related transportation both in *character* and *amount*—incidental because limited to otherwise empty trucks returning from hauling member farm products to market and producing a *small return* in proportion to Northwest's *income from trucking farm products* and farm supplies; necessary because it is not economically feasible to operate the trucks empty on return trips and because the additional income obtained is no more than that required to render performance of the cooperative's primary farm transportation service financially practicable. (Underscoring supplied)

The Court concludes that the Government hauls herein were not incidental and necessary to the grain haul. Defendants

have tendered evidence that the eastbound movement prior to the first Government shipment was a member shipment and that the westbound movement following the last Government haul was also a member shipment. However, defendant Howard McCormack, general manager of American, testified that a round trip commences with the westbound haul from the home base territory and ends with the eastbound haul back to that area. Hence, the round trip here begins and ends with the Government hauls. Defendants have introduced Exhibits 6B1 through 6B34 showing Government hauls to Hill Airforce Base, Utah, the grain haul from Utah to California, and then a member haul back to the Midwest. These appear to be proper and lawful as cooperative movements but the same cannot be concluded when this grain haul is sandwiched between two Government shipments. The Court concludes that in those instances when the round trip includes a Government haul, then a member grain haul as shown here, followed by another Government haul—all on the same round trip—the Government movements are unlawful, are not necessary and incidental to the member grain haul, are not exempt under Title 49, Section 303(b)(5), U.S. Code, and are in violation of the provisions of the instant injunction.

Plaintiffs introduced evidence with respect to four other types of operations being performed by the defendants. These include so-called "bobtail" operations such as moving a Government shipment to Bangor, Washington, then dropping the loaded trailer and headheading the tractor back to Oklahoma City, pulling another empty trailer to Springfield, Missouri, and then moving a trailer with a Government shipment to Bangor, all as shown in Exhibit 26. The second operation involves the back-to-back movement of Government shipments by the same tractor but using different trailers, as shown in Exhibits 3, 4, 6, 8, 9, 10, and 15.

The third type is described as a "shuttle" operation where one tractor is used to pull empty and loaded trailers between shipping installations and the terminals of American at Oklahoma City or Springfield, Missouri, as shown in Exhibits 13, 14, 16, 17, 18, and 19. Since the entry of the injunctions herein and in the companion case, the defendants had adopted the practice of following the trailers in complying with the back-to-back prohibitions thereof. In other words, if a trailer moved a Government or nonmember shipment, its next shipment had to be a member haul. Records were kept upon this basis to assure compliance with the injunctions. Little or no attention was paid to the tractor in this respect. The Court is aware of the novelty of this point. The back-to-back prohibitions of these injunctions did not cover this point. Nor is the Court aware of any prior expressions on this point by the Commission or any court with regard to the incidental and necessary tests. The first official recognition of this issue was on May 7, 1969, when the Interstate Commerce Commission, intervenor herein, adopted rules and regulations in Ex Parte No. MC-75, *Implementation of Public Law* 90-433—*Agricultural Cooperative Transportation Exemption,* reported in 108 M.C.C. 799. One of the rules adopted to be known as 49 CFR 1047.21(a) reads as follows:

> (a) The phrase "incidental to its primary transportation operation and necessary for its effective performance" means that the interstate transportation of the cooperative association or federation of cooperative associations for nonmembers as described above is performed *with the same trucks or tractors* employed in a prior or subsequent trip in the primary transportation operation of the cooperative association or federation, that it is not economically feasible to operate the *trucks or tractors* empty on return trips (outbound trips in cases where the primary transportation operation is inbound to the association or federation), and that the

> additional income obtained from such transportation is necessary to make the primary transportation operation financially practicable. (Underscoring supplied)

These regulations became effective on July 7, 1969. Under this regulation, cooperative associations or federations will be required to follow the tractor or truck rather than the trailer. Upon the basis of the record herein, the Court cannot conclude that the defendants are in deliberate violation of the injunction herein with respect to these three types of operations.

In the fourth instance defendants transported Government freight on trailer V-670 from Oakland, California to Oklahoma City thence to McAlester where it unloaded. This empty trailer was then pulled back to Oklahoma City and from there to Crane, Indiana where it was loaded with Government freight and then pulled to Bangor, Washington. These movements took place between October 31 and November 29 and involved four different tractors. At first blush these movements would seem to be a direct violation of both the letter and the spirit of the injunction. The defendants make a lame attempt to justify the operation by pointing out that a member load was delivered a San Francisco on this trailer immediately prior to the loading of Government freight at Oakland and that a member load was taken on at Hood River, Oregon, shortly after off-loading at Bangor so by attaching the two member loads to the front and back of the whole movement and treating the trips as separate and severed at either McAlester, Oklahoma City or Crane there would be no back-to-back trailer violation. While I cannot accept such contention I do excuse this movement as being inadvertent and unintentional. I am firmly convinced that defendants made a studied and diligent effort to avoid this particular type of back-to-back trailer movement so as

to appear to be in compliance with the letter of that part of my earlier comments in companion Case No. 67-487, to-wit:

> "The cooperative may, in my opinion, haul nonfarm, nonmember products for hire without an I.C.C. permit in returning from the delivery of member owned and produced products or may haul nonfarm, nonmember products for hire in going after a load of member owned and produced products and not transgress applicable statutes."

while simultaneously, completely and deliberately ignoring the spirit and the letter of the latter injunction order entered in the instant case which provides, as heretofore set out, that nonmember freight may be hauled only

> *"when necessary to prevent proceeding with an empty vehicle movement."*

Defendants contend the injunction is vague and indeed once sought clarification but I find the order is clear and understandable on the type of operations that are found to be in violation. Defendants are exonerated in the areas where there might be some ambiguity.

Many of the exhibits in evidence depict eastbound Government shipments transported by American from California points to the Midwest. Although not categorized among the six others these eastbound Government shipments are found illegal. Representatives of two members of American, namely, Taylor Merriman of Tri-Valley Growers and Mr. Loney of California Canners and Growers (Kal-Kan), testified to the overwhelming needs of their concerns for the eastbound transportation services of American. Mr. Loney averred that his firm could give a shipment to American whenever one of its vehicles made an appearance. This being true, it follows that American was unlawfully transporting the eastbound Government

shipments contrary to the injunction herein. The fallacy of defendants' argument contending for the lawfulness of these eastbound Government shipments is that the cooperative membership hauling has not been its first concern. Although defendant McCormack testified that membership shipments were given first consideration, the facts of record do not support his statement. Its Government hauling appears to be its first concern. The thrust of the involved statutes, case law on the subject, and the injunction herein is that the cooperative farm transportation must come first and the other transportation—nonmembership and Government—should be used to fill in to prevent an otherwise empty movement of the vehicle used in accomplishing the farm cooperative movement. In addition to the eastbound Government shipments in the above-discussed "sandwich" moves, others are shown in Exhibits 1, D3-2-A, D3-3-A, D3-4-A, D3-7-A, D3-8-A, D3-9-A, D3-10-A, D3-17-B, D3-17-C, D3-17-G, D3-17-H, and D3-17-I.

Despite defendants' claims that they have made a "positive effort" not to violate this Court's orders and that they do not "look for" non-member business and that such business is only used when their member business is in "imbalance", additional facts were developed by the evidence which, while not directly supportive of any of the six types of transportation movements complained of by plaintiffs, are demonstrative of the general devotion of defendants to their government traffic and their preferential handling of such over the traffic of their own members. Some of these facts are:

(a) The revenue derived by American Farm Lines from their government traffic for the slightly over two-month period in issue was $1,603,195.

(b) During the same approximate two-month period

72.3% of American Farm Lines' total revenue was from government traffic, 40.2% of its total tonnage was hauled for the government and 44.5% of its total trips during such time was also for the government.

(c) The original "back-to-back" injunction was issued by this Court on February 20, 1968, and the second injunction, necessary because of the method of operation adopted by defendants, was issued May 28, 1969. These orders have not discouraged defendants from their continued concentration on government hauling. For American Farm Lines' fiscal year October 1, 1966 through September 30, 1967, it did slightly over $1,400,000 worth of member business and nearly $1,300,000 worth of government business. For its fiscal year October 1, 1967 through July 31, 1968, (during the last five months of which it was under one or both of this Court's injunctions) its member business remained about the same at about $1,450,000, while its government business increased nearly three-fold to over $3,350,000. Also, on July 1, 1967, American Farm Lines had only 72 tractors and 77 trailers. By December 1, 1968, these had increased to 194 tractors and 279 trailers. Defendants' method of comparing their member and government traffic in terms of pounds carried is not valid because the factor of the length of the haul is not included. But even accepting these figures, the amount of American Farm Lines' government freight increased from 40 million pounds in 1967 to 108 million pounds in 1968, and the projection for 1969, based upon the first six months, will be 164 million pounds, if defendants are unrestricted in their operations.

(d) The per mile cost of transportation for American Farm Lines is approximately forty-five cents. A com-

putation from a number of defendants' exhibits covering member hauls from the west coast show the per mile revenue from these to be in the neighborhood of only nineteen to twenty-six cents. The president of American Farm Lines did not know if the membership freight hauls from the west coast paid for themselves. It is obvious that defendants' growth and increase in gross revenue has not come from their member business.

(e) Although defendants admit that their biggest continuous problem in handling membership business is not having sufficient equipment to meet the needs of their west coast members, American Farm Lines does dispatch government loads from the west coast. There are also many examples of American Farm Lines' equipment bypassing its California members with empty trailers, on its way to pick up government loads.

The Court further finds that plaintiffs, or some one of them, would have made the hauls herein found to be in violation of the injunction had not the defendants done so and that the defendants realized and plaintiffs lost profits of $43,650.39 by reason of the wrongful and contemptuous acts aforesaid.

The reasonable fee for plaintiffs' attorneys is found to be $30,000.00 and actual expenses incurred by these lawyers in connection with this proceeding are found to be $797.53.

CONCLUSIONS OF LAW

Defendants, and each of them except Strohfield, are in contemptuous violation of the express and necessarily implied terms of this Court's order.

The nature of defendants' operations and the fact that the bulk of their revenues are derived from government

transportation show that they are in the general trucking business for the United States Government beyond the limited exemptions allowed by law (49 U.S.C.A. §§ 303(b)(5); *Northwest Agricultural Cooperative* v. *ICC* 350 F.2d 252).

With respect to the "Long Layover" movements, the Court concludes that defendants were in contemptuous violation of its injunction because the government loads were not coordinated with a member's order for transportation and because in most instances after the delivery of the government freight, the vehicles in question were [illegible]0 to 1,000 miles away from the member they were [illegible] It was never the Court's intention to allow such diversion.

The "Sandwich Moves" are a subterfuge in an attempt to camouflage contemptuous hauling for the United States Government. The grain moves which defendants travel great distances to handle produced less than $150 per load —less than one-half their cost of transportation. There can be no rational economic justification for such conduct except to support prohibited government hauling. This is confirmed by the conduct of defendants in hauling government freight in an easterly direction from the west coast after delivery of the grain. (*Hoffman LaRoche, Inc.* v. *Schwegman Bros.* G.S., 122 F. Supp. 781; *Riss, et al.* v. *Murphy, et al.*, U.S.D.C. W.D. Okla. #68,222 and U.S.D.C. S.C. Iowa Civ. #8-2207-C-1).

All Government and nonmember freight moved by defendants from the west coast to and toward the Midwest and east during the time involved herein was done illegally and in direct and willful disobedience of the order of this Court because none of defendant's trips in such hauling were necessary to prevent an empty trailer movement.

The Court concludes that plaintiffs are entitled to damages as a result of the revenues diverted from them by

defendants' contemptuous violations of the Court's injunction in the amounts equal to defendants' net revenues from each item of transportation shown in these findings in the total amount of $43,650.39, and to their costs herein. (*Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448). The Court further concludes that these amounts accurately reflect the profit the plaintiff would have made from such carriage had defendants not diverted the revenues from plaintiffs. The Court further concludes that some of the plaintiffs would have transported all of said Government loads had not plaintiffs diverted them. *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448. *Wheldon* v. *MGM*, 106 F.2d 45.

Plaintiffs are entitled to an attorney fee in the amount of $30,000, plus expenses in the amount of $797.53, to be paid by defendants.

Counsel for plaintiffs will submit an appropriate judgment. It being the firm and considered opinion of this Court that the contemptuous acts herein found to have been committed were caused and brought about primarily by the defendant, Howard McCormack, it is directed that, if possible, he personally pay the sums above stated and which will be recited in the judgment; however, and since he was at all times acting as the manager of American Farm Lines the judgment will run against both jointly and severally with the proviso that should plaintiffs be unable to satisfy the judgment as against McCormack resort may be had as against American Farm Lines for the whole or any remaining part. The judgment will further recite that American Farm Lines will, if it so requests, have judgment over as against McCormack for any part thereof that American Farm Lines be required to pay.

DATED this 24th day of July, 1969.

Luther B. Eubanks
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Filed July 31, 1969, Vera L. Howard, Clerk, U.S. District Court, by Zeta M. Cowan, Deputy.

MUNITIONS CARRIERS CONFERENCE, INC.;
CONSOLIDATED FREIGHTWAYS;
PACIFIC INTERMOUNTAIN EXPRESS;
RISS & COMPANY, INC.;
TRI-STATE MOTOR TRANSIT COMPANY;
ILLINOIS CALIFORNIA EXPRESS, INC.;
RINGSBY TRUCK LINES, INC., and
IML FREIGHT, INC.,
Plaintiffs,

vs.

AMERICAN FARM LINES, a Cooperative Marketing Association;
HOWARD McCORMACK and E. E. STROHFIELD,
Defendants,

INTERSTATE COMMERCE COMMISSION,
Intervenor.

Civil No. 68-148

JUDGMENT

The Court having filed with the Clerk of this Court, Findings of Fact and Conclusions of Law, concerning the show cause proceeding herein and filed for record herein on July 24, 1969, the Court makes the following judgment based thereon:

IT IS THE ORDER, JUDGMENT AND DECREE of the Court that defendants, Howard McCormack and American Farm Lines, are in contempt of the injunction entered herein on May 28, 1968, and judgment is hereby entered against each of them jointly and severally and in favor of plaintiffs in the amount of $43,650.39, plus an attorney fee in the amount of $30,000.00, and plus expenses in the amount of $797.53, with interest on the total sum of $74,447.92, at ten percent (10%) per annum from July 24, 1969, and for the costs of the action, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be and it is hereby entered in favor of defendant, E. E. Strohfield, against plaintiffs on said show cause proceeding herein.

Dated this 31st day of July, 1969.

Luther B. Eubanks
United States District Judge

Judgment entered in Civil Docket on July 31, 1969, Adelaide Holston, Deputy.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Filed United States Court of Appeals, Tenth Circuit, July 30, 1969, William L. Whittaker, Clerk.

JULY TERM—1969

MUNITIONS CARRIERS CONFERENCE, INC.; CONSOLIDATED FREIGHTWAYS; PACIFIC INTERMOUNTAIN EXPRESS; RISS & COMPANY, INC.; TRI-STATE MOTOR TRANSIT COMPANY; ILLINOIS CALIFORNIA EXPRESS, INC.; RINGSBY TRUCK LINES, INC., and IML FREIGHT, INC., *Plaintiffs-Appellees,* vs. AMERICAN FARM LINES, a Cooperative Marketing Association; HOWARD McCORMACK and E. E. STROHFIELD, *Defendants-Appellants,* INTERSTATE COMMERCE COMMISSION, *Intervenor-Appellee.*	Civil Nos. 10177 & 10178

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
(District Court No. 67-487 Civil)

James M. Robinson, Oklahoma City, Oklahoma, for appellants.

Grey W. Satterfield, Oklahoma City, Oklahoma, for appellees.

Harry F. Horak, Fort Worth, Texas (J. F. Walker, Fort Worth, Texas, and Bernard A. Gould, Washington, D.C., with him on the brief) for intervenor-appellee.

Before PHILLIPS, SETH, and HICKEY, Circuit Judges.

HICKEY, Circuit Judge.

This consolidated case comes to us on the appeal of three judgments entered by the United States District Court for the Western District of Oklahoma in two separate cases. Two judgments were entered in favor of appellees Munitions Carriers Conference, Inc., and several other motor carriers, enjoining appellants American Farm Lines, and two of its employees, from continuing certain carrier operations. The other judgment was entered in favor of the appellee Interstate Commerce Commission which intervened in each case.

Munitions Carriers is an association of motor carriers licensed to transport Classes A and B explosives under authority granted by the Interstate Commerce Commission,

an agency of the United States Government. The other appellees herein are motor carriers engaged in the same occupation.

American Farm Lines is a cooperative marketing association incorporated under the laws of the State of Oklahoma.

At the time of the initial action American Farm Lines was engaged in hauling government freight and Classes A and B explosives on government bills of lading in interstate commerce. American Farm Lines is authorized to transport farm to market and market to farm products for the use and benefit of its agrarian members.

The initial action was filed on December 8, 1967, and the resulting judgment permanently enjoined American Farm Lines, its General Manager, Howard McCormack, and its government division director, E. E. Strohfield, from transporting in interstate or foreign commerce as motor carriers over and upon the public highways for compensation, the following commodities: (1) Classes A or B explosives on government bills of lading in roundtrip (back-to-back) movements; (2) Classes A or B explosives on government bills of lading in connection with the transportation of other freight shipped on government bills of lading in roundtrip (back-to-back) movements; (3) freight shipped on government bills of lading in roundtrip (back-to-back) movements. The judgment proscribed these operations until such time as authorized by the I.C.C.

Approximately three months later the court granted the I.C.C.'s motion for summary judgment in the same case and permanently enjoined appellants from transporting explosives for the government in connection with the movement of non-exempt, non-member traffic in the reverse direction in interstate or foreign commerce for compensation unless authorized to do so by the I.C.C.

Thereafter, on April 16, 1968, the plaintiffs (appellees herein) and three additional motor carriers filed the succeeding action against the defendants (appellants herein). The I.C.C. again intervened. This action terminated in a summary judgment filed May 28, 1968, which enjoined American Farm Lines and their named employees from the for-hire transportation in interstate or foreign commerce of any products other than those products mentioned in 12 U.S.C. § 1141(j) except when proceeding outbound to pick up and transport market to farm products or in returning from farm to market delivery with an otherwise empty vehicle. As in the preceding judgments this proscription was conditioned upon subsequent authorization of the enjoined transportation by the I.C.C.

On January 24, 1968, prior to the challenged judgments, the I.C.C. filed notice of institution of administrative proceedings in relation to American Farm Lines and its identified employees. The notice purported to exclude from consideration, in the administrative hearings, the issues then before the trial court. I.C.C. briefs filed herein also proclaim this intent. The contemporaneous construction placed by the Commission upon the provisions of the I.C.C. Act are entitled to great weight and respect and will not be overturned unless they are arbitrary or plainly erroneous.[1]

Appellants challenge the jurisdiction of the court on the grounds that the acts complained of were not a clear and patent violation of the Interstate Commerce Act.

Jurisdiction in both actions is based upon 49 U.S.C. § 322

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[1] I.C.C. v. Weldon, 90 F. Supp. 873, 877 (W.D. Tenn. 1950), *aff'd per curiam*, 188 F.2d 367 (6th Cir.), *cert. denied*, 342 U.S. 827 (1951); *accord*, East Texas Motor Freight Lines, Inc., v. Frozen Food Express, 351 U.S. 49, 54 (1956).

(b)(2).[2] This statute gives the court jurisdiction over "clear and patent" violations of certain sections of the Interstate Commerce Act requiring certification or licensing of motor carriers.

49 U.S.C. § 303(b)(5)[3] is the provision in the I.C.C. code which excludes from regulation motor vehicles controlled and operated by cooperative associations.

The provisions applicable at the time of trial and the 1968 amendment to § 303(b)(5) each limit the application of the exemption to "a federation [possessing] no greater powers or purposes than cooperative associations so defined, . . ."

The definition of cooperative association is found in the Agricultural Marketing Act of June 15, 1929. The definition, now contained in 12 U.S.C. § 1141(j)(a), establishes that a cooperative association must be an association (1) "in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged . . ." (2) "That [is] operated for the mutual benefit of the members thereof as such producers

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[2] 49 U.S.C. § 322(b)(2) provides: "If any person operates in clear and patent violation of any provisions of section 303(c), 306, 309, or 311 [which require persons dealing in interstate commerce by motor vehicle to obtain a certificate or license] of this title, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court . . . for the enforcement of such section, or of such rule, regulation, requirement, or order."

[3] 49 U.S.C. § 303(b) provides: "Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include . . . (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act. . . . "

or purchasers . . ." and (3) "[that] conform[s] to one or both of the following requirements:

> First: That no member . . . is allowed more than one vote . . . Second: That the association does not pay dividends . . . in excess of 8 per centum per annum. And in any case to the following: Third. That the association shall not deal in farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association."

Appellants rely heavily on the last sentence of the third requirement above set out and contend that this provision exempts them under 49 U.S.C. § 303(b)(5) as amended.

The "incidental and necessary" test recently adopted by this court[4] teaches "that the transportation activities of a cooperative must be incidental to its primary statutory activity and necessary to the effective performance of that activity."[5]

The primary statutory activity of producing and purchasing of farm products is set out in 12 U.S.C. § 1141(j)(a) above quoted. Section 1141(j)(a) also provides that cooperative associations must be operated for the mutual benefit of the members as such producers or purchasers. In addition, such associations must conform to the three requirements set out in § 1141(j)(a) including the requirement containing the provision relied upon by appellants.

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[4] I.C.C. v. Milk Producers Mkt. Co. 405 F.2d 639 (10th Cir. 1969). The "incidental and necessary" test was also made a part of 49 U.S.C. § 303(b)(5) by the 1968 amendment.

[5] *Id.* at 641.

These three requirements are not the primary statutory activities but are limitations. Therefore the incidental and necessary test as applied directs itself to an examination and conclusion of whether or not the exclusive carrying of explosives or other government property for the government is incidental and necessary to the defined activities of the cooperative.

The order of the trial court permits the transportation of government property for either an outbound or an inbound trip of a carrier when its farm to market or market to farm produce is carried on the other half of the trip.

We recognize the economic advantage to the appellant's transportation business by permitting the exclusive transportation of government property in both directions. However, we cannot find it described in the primary activities described in the provisions of the act.

Justification for the favored position of farm marketing cooperatives is based upon the necessity of making the cooperative efforts of the agrarian community competitive in the market place.[6] However, we have said, "back-to-back hauling of general commodities for nonmembers throughout the United States by motor vehicles on a for-hire basis . . . [is] not incidental to the [business of the cooperative.]"[7] Transportation of government commodities not incidental to the agrarian well-being cannot be said to be a primary activity of the cooperative.

We conclude, from a review of the record of the first proceeding, that no genuine issue as to any material fact

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[6] 12 U.S.C. § 1141(a) provides that it is the policy of Congress to place the industry of agriculture on a basis of economic equality with other industries.

[7] I.C.C. v. Milk Producers MKT. Co., 405 F.2d 639, 641-2 (10th Cir. 1969).

existed. Accordingly, the I.C.C. was entitled to a summary judgment as a matter of law pursuant to Fed. R. Civ. P. 56(c).

The transportation proscribed by the trial court was not exempted under § 303(b)(5), therefore, the clear and patent violation of § 322(b)(2) is made evident by the above recited conclusion of this court. The trial court's conclusion of initial jurisdiction is therefore affirmed and its judgment and findings are affirmed.

APPENDIX E

Headquarters
Department of The Army
Office of The Judge Advocate General
Washington, D.C. 20310

EXHIBIT C

U 672
JAGU 1968/9695

30 April 1968

Mr. Howard McCormack
General Manager
American Farm Lines Co-op
Oklahoma City, OK 73107

Re: Application of American Farm Lines, Inc., to Transport General Commodities Including Class A and B Explosives

Dear Mr. McCormack:

As duly authorized counsel for the Secretary of the Army and the Department of Defense, I have been asked to reply to your request for the Department of Defense support in connection with your application before the Interstate Commerce Commission to transport general commodities, including Class A and B explosives.

The Department of Defense has used the services of American Farm Lines, Inc., to transport more than 1,200 shipments since December 1966. Your service has been excellent in every respect. In fact, the Department of Defense has found American Farm Lines' service to be fast, efficient, responsive, and economical. Under the circumstances, the Department of Defense is desirous of being able to continue to use the services of American Farm Lines. In many instances the Department of Defense receives direct through service from American Farm Lines, Inc. which is desirable. In other words, the Department of Defense would like to

retain this transportation source which has been available to it. However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines.

Should an oral hearing be held on your application, the Department of Defense will present an authorized and qualified witness to testify to the above facts.

Sincerely yours,

C. L. W.
CURTIS L. WAGNER, JR.
Chief, Regulatory Law Division

Mr. Wagner/svm/30 Apr 68

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 369.

AMERICAN FARM LINES,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, et al.,
Appellees.

No. 382.

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, et al.,
Appellees.

On Appeal from the United States District Court for the Western District of Washington.

MOTION OF UNITED TRANSPORTS, INC., TO DISMISS OR AFFIRM.

United Transports, Inc., respectfully moves the Court pursuant to Rule 16 to dismiss the appeal herein or, in the alternative, to affirm the judgment of the District Court on the grounds that the questions presented are so unsubstantial as not to require argument.

POSITION OF THE UNITED STATES.

Significantly, the United States, acting through the Solicitor General, has filed in this Court a Memorandum in which it is stated in part:

> "The United States has not considered the issues involved in these cases of sufficient importance to warrant its seeking plenary consideration by this Court . . ."

QUESTIONS INVOLVED.

The Jurisdictional Statement of American Farm Lines in Case No. 369 presents two questions alleged to be involved, which questions are largely duplicated in the Jurisdictional Statement on behalf of the Interstate Commerce Commission in Case 382.*

The first of these raised is the question of the existence of an immediate and urgent need for the institution of the service under temporary authority sought by American Farm Lines, and the second deals with a procedural matter, the decision of which below was not in any wise determinative of the result reached by the District Court.

Whether the Interstate Commerce Commission reopened properly or improperly or whether at that time the matter was, or was not, administratively final, can be of no moment since the Interstate Commerce Commission did, in fact, reopen, did, in fact, receive new evidence, which evidence was, in fact, considered by the Interstate Commerce Commission and by the District Court, and which evidence the District Court found even with that last received did not clearly establish an immediate and urgent need for the service proposed.

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* As mentioned above, the United States filed a Memorandum but no Jurisdictional Statement.

Any fair reading of the evidence first received or that later received impels the reader inescapably to the conclusion that rather than there being a vacuum of service, or an inadequate service, or, in fact, an immediate or urgent need for new service, the evidence proved affirmatively the existence of ample service coupled with the existence of other service completely untried.

The purpose of setting forth in regulations governing applications for temporary authority certain specific criteria by which temporary authority applications are to be judged is to provide a set of guide lines of an unmistakable character, thereby assuring the Interstate Commerce Commission that when it acts on such an application, it does so on a firm basis which will underlie the statutory findings required to be made.

Failure to comply with the prescribed criteria simply results in a failure to provide a basis in proof.

Reduced to fundamentals, these criteria merely present the question how one can criticize as inadequate service that has not been tried, or how one can say that there exists an immediate and urgent need when the evidence shows to the contrary.

The candor of the Department of Defense is admirable, and no amount of rephrasing or glossing over by jurisdictional statements, by arguments, by innuendo or otherwise, can alter the effect of the statement first made in the letter of support dated April 30, 1968. In that letter the Department of Defense, among other things, said:

> ". . . The Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines . . ."

Indeed, there would not, and this is the essence of the District Court's findings which this Court should affirm.

CONCLUSION.

In light of the fact that the conclusions reached by the District Court are clearly correct as to pivotal matters and in light of the fact that the procedural question raised is of no moment, it is respectfully urged that the questions raised are not substantial and do not merit plenary consideration.

Respectfully submitted,

JAMES W. WRAPE,

ROBERT E. JOYNER,
2111 Sterick Building,
Memphis, Tennessee 38103,
Attorneys for Appellee,
United Transports, Inc.

Of Counsel:
WRAPE and HERNLY,
Memphis, Tennessee
and
Washington, D. C.

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Nos. 369 and 382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

AMERICAN FARM LINES,
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Appellant,

v.

BLACK BALL FREIGHT SERVICE, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Washington

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MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, ET AL.,
Appellees.

No. 382

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

BLACK BALL FREIGHT SERVICE, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Washington

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellees listed in Appendix A hereto move that the final judgment of the District Court be affirmed on the

ground that the questions presented are so unsubstantial as not to require further argument.

STATEMENT

Involved are appeals by the Interstate Commerce Commission (Commission) and American Farm Lines (AFL), from a judgment [1] of a three-judge district court entered March 26, 1969, reported at 298 F. Supp. 1006. The court below, without dissent, set aside two orders of the Commission [2] which granted temporary authority to AFL to conduct motor carrier operations for the Department of Defense (DoD) between points in nine midwestern states and five western states.

AFL is an "agricultural cooperative," [3] with an alleged purpose to provide transportation services to its members. Section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(5), exempts this type of service from economic regulation. The exemption was construed by a U.S. Court of Appeals [4] in 1965 to permit agricultural cooperatives to transport nonfarm-related freight for nonmembers by motor vehicle to the extent that such is "incidental and necessary" to the effective performance of a cooperative's farm-related operations. The court related these terms to Northwest's transportation of non-

[1] The opinion of the court below is printed as Appendix A (pp. 1a-12a) to the jurisdictional statement in No. 369. The judgment is printed as Appendix B thereto (pp. 13a-17a).

[2] J.S. in No. 369, App. C and E.

[3] The question of whether AFL has, since its inception, operated as a *bona fide* co-op is involved in another proceeding before the Commission which has been joined with AFL's application for permanent operating authority. Docket Nos. MC-C-5835 and MC-129908 (Sub-No. 1). Joint hearings in these proceedings are under way.

[4] Northwest Agricultural Cooperative Ass'n v. Interstate Commerce Commission, 350 F. 2d 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

farm products and supplies and found it to be incidental and necessary both in character and amount:

> Incidental because limited to otherwise empty trucks returning from hauling member farm products to market, and producing a small return in proportion to Northwest's income from trucking farm products and farm supplies; necessary because it is not economically feasible to operate the trucks empty on return trips, and because the additional income obtained is no more than that required to render performance of the cooperative's primary farm transportation service financially practicable.[6]

Shortly after AFL began hauling freight for DoD in December, 1966, it began conducting a general trucking business transporting DoD traffic in back-to-back movements. A United States district court enjoined this round trip (back-to-back) service as not exempt under section 203(b)(5) of the Interstate Commerce Act.[6] Thereupon, AFL began transporting DoD traffic in one direction and moving the vehicle empty in the opposite direction in order to effect literal compliance with the injunction. The same court, on the same grounds, again enjoined AFL from providing this transportation except as a leg of a round trip, the other leg of which constitutes transportation of farm-related commodities performed for its members.[7] Both of these judgments have been recently affirmed by a United States Court of Appeals.[8]

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[6] *Id.*, at 255.

[6] Munitions Carriers Conference, Inc. v. American Farm Lines, 1968 F. Carr. Cas. ¶ 81,993 (W.D. Okla.). Plaintiffs, in addition to the Conference, were seven motor carriers franchised by the Commission to transport general freight (including munitions), including some of the appellees herein.

[7] Munitions Carriers Conference, Inc. v. American Farm Lines, Civil No. 68-148, D.C.W.D. Okla., May 28, 1968.

[8] Munitions Carriers Conference, Inc. v. American Farm Lines, 1969 F. Carr. Cas. ¶ 82,122 (10th Cir.); the court's opinion is printed in Motion of Railroad Appellees to Affirm at pp. 19A-26A.

Still undeterred, AFL continued to operate substantially as a for-hire motor carrier for DoD traffic. Plaintiffs in the two injunction proceedings [9] filed a show cause petition in the Oklahoma district court seeking punishment of AFL for violation of its injunctions. That court has recently concluded [10] that AFL is in contemptuous violation of its injunctions and that the nature of AFL's operations and the fact that the bulk of its revenues is derived from government transportation demonstrate that it is in the general trucking business beyond the limited exemption allowed by law. The court found a "general devotion of defendants to their government traffic" and "preferential handling of such over the traffic of their own members." [11] The court assessed damages of almost $75,000 against AFL, consisting of $43,650 representing profits illegally diverted from plaintiff carriers over approximately a two-month period, and the remainder in attorney's fees and expenses.[12]

Further frustrating the aims of AFL was Congressional enactment of Public Law 90-433, 82 Stat. 448, effective July 26, 1968, which specifically limits the amount of nonmember traffic which may be handled under the agricultural cooperative exemption contained in Section 203(b)(5) of the Interstate Commerce Act. Congressional action was taken because certain cooperatives were taking undue advantage of the *Northwest* decision, and it was being used by others as a device to mask illegal operations.[13]

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[9] The Commission intervened as an additional plaintiff.

[10] Munitions Carriers Conference, Inc. v. American Farm Lines, Civil No. 68-148, D.C.W.D. Okla., July 24, 1969; the court's opinion is printed in full in Motion of Railroad Appellees to Affirm at pp. 2A-16A.

[11] See Motion of Railroad Appellees to Affirm, p. 12A.

[12] *Id.*, p. 16A.

[13] The Report of the Senate Commerce Committee, 90th Cong., 2d Sess., Senate Report No. 1152, states at page 6:

[Footnote continued on page 5]

Much is made in the jurisdictional statements of AFL and the Commission [14] regarding the claimed need for AFL's services by DoD and the alleged harm caused DoD by the enactment of Public Law 90-433 limiting even *bona fide* farm co-op nonmember for-hire transportation to 15 percent of their total transportation. Yet Congress was faced with these same claims, i.e., that enactment of the law in question, particularly the 15 per cent limitation on nonmember for-hire transportation, would deprive the military of the "efficient service" of farm cooperatives at "reasonable cost without adverse impact on regulated carriers." [15] Despite these "dire warnings," Congress enacted the legislation.

In order to transport DoD traffic without the limitations imposed by the injunctions and the newly amended exemption provision, AFL filed in May, 1968, the temporary authority application here under consideration. Should AFL succeed herein, it could continue to transport DoD traffic until a final determination by the Commission on AFL's permanent authority application,[16] which was

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[13] [Continued]

Regardless of the state of the law prior to the *Northwest* decision, the committee considers that it is clear that this decision, and the publicity attendant thereto has, as a practical matter, been construed by some cooperatives as an invitation to substantially expand their hauling of non-farm-related traffic for nonfarm members, and by certain groups and organizations as a device to institute unlawful transportation activities.

[14] J.S. in No. 369, pp. 12-13; J.S. in No. 382, pp. 3, 5-6.

[15] Letters of Stanley R. Resor, Secretary of the Army, in Hearings on S. 752, Subcommittee on Surface Transportation, Senate Commerce Committee, 90th Cong., 1st Sess., ser. 90-34, pp. 153-154 (1967), and Hearings on H. R. 6530 and S. 752, by the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess., ser. 90-45, pp. 9-10 (1968).

[16] This Court held, in Pan-Atlantic S.S. Corp. v. Atlantic Coast Line RR., 353 U.S. 436, that a grant of temporary authority was a "license" which, under the provisions of Section 9 of the Adminis-

filed in July, 1968. Such an extensive application, affecting numerous existing carriers, will undoubtedly require several years for final determination. There is definite evidence that AFL, if permitted, would haul substantially more DoD traffic in the future. In AFL's fiscal year 1967, gross revenue from government traffic amounted to $1,284,594.94; in 1968, $4,449,478.39; and in the first six months of 1969, $4,040,633.80.[17]

With the foregoing facts in perspective, we turn now to the temporary authority proceeding here involved. In an unprecedented move, DoD agreed to support this type of application.[18] The numerous protests to AFL's temporary authority application pointed out that the sole supporting letter of the DoD did not supply even the minimal information required by the Commission's regulations[19]

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trative Procedure Act, remains in effect until the Commission has "finally determined" a corresponding application for permanent authority.

[17] The gross revenue for the first six months of 1969 constituted 65% of the total revenue of American Farm Lines during that period. These figures, gathered by the Commission's Bureau of Enforcement, appear in Exhibit H-2 in Docket No. MC-C-5835. The exhibit is attached to appellees' replies to Motions of AFL For Stay Pending Appeal, filed below and with this Court. The motion below was denied by order dated July 22, 1969; the motion before this Court was granted by Mr. Justice Douglas' order of August 21, 1969.

[18] The DoD witness in the hearing on AFL's permanent authority application testified that until then, applications for single-line service were not being supported by DoD where adequate interline service existed. The witness testified that a policy restatement was made in June, 1968, to permit for the first time support of such applications and the regulations are in the process of revision. (Transcript pp. 611-615) In a letter dated 15 days prior to its letter supporting AFL's application, DoD had indicated to AFL it was unable "to state that there would be insufficient or inadequate service without American Farm Lines." This letter was attached as Exhibit C of appellees' original complaint below and is printed in full in the Motion of Railroad Appellees to Affirm at pp. 27A-28A.

[19] 49 C.F.R. § 1131.2(c). These regulations list eleven items which any supporting statement must contain. The items are enumerated in the jurisdictional statement in No. 369 at pages 8-9, n. 10.

and, concomitantly, that AFL failed to meet its statutory burden of proof.[20] Protestant carriers also expressed their willingness and ability to meet the reasonable service requirements of DoD. The Commission's Temporary Authorities Board, by order served July 15, 1968, denied AFL's temporary authority application.

AFL petitioned for reconsideration and, at that late date, introduced seven exhibits purporting to show inadequacies of some existing services. Protestants' replies thereto specifically refuted these charges and pointed out that AFL's attempt to discredit the services of a few (7) of the more than 100 protesting carriers by the submission of the seven exhibits fell short of curing applicant's failure to meet its statutory burden of proof. A three-member appellate division of the Commission granted the temporary authority sought on September 3, 1968.

Since the matter was administratively final,[21] complaint

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[20] 49 U.S.C. § 310a(a) provides:

> (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be.

[21] AFL is wrong in suggesting that further petitions for reconsideration were authorized, even though some were filed by certain protestants. (J.S. in No. 369 at page 15) AFL cites the Commission's General Rules of Practice; however, the first general rule, 49 C.F.R. § 1100.1, reads:

> The rules in this part govern procedure before the Interstate Commerce Commission in proceedings under the Interstate Commerce Act and related acts, unless otherwise directed by the Commission in any proceeding.

The special rules governing petitions for reconsideration in temporary authority application proceedings clearly limit such petitions, at 49 C.F.R. § 1131.6:

> (a) *Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the

was filed in the court below to set aside and annul the Commission's order of September 3, 1968. The court, on October 2, 1968, entered an order staying, *pendente lite*, the effective date of the Commission's order. Despite this, the Commission, on its own motion, by order of November 5, 1968, ordered its proceedings reopened for the purpose of receiving an additional statement by DoD and such reply statements as might be filed by protestants.

The "new" statement of DoD was nothing more than an expression of interest in single-line service. DoD contended that the regulated motor carriers hold "bits and pieces" of authority and that even where complete authority is held between certain points, the regulated carriers prescribed routes are circuitous.[22] The statement

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Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person.

The September 3, 1968, order was issued by Division 1 of the Commission acting in an appellate capacity, which situation fits neither of the above categories. Where the temporary authority rules are applicable to all three situations, they are so stated. For instance, 49 C.F.R. § 1131.4(b) reads, in part:

> The following standards shall be used by the Temporary Authorities Board, and by Division 1 of the Commission acting initially or *in an appellate capacity*. . . . (Emphasis supplied)

[22] Of course, many of the motor carriers, as shown in their protests, possess the requisite authority and do perform direct single-line service between many points. Due to DoD's policy change, regulated motor carriers with restricted authority are now able to seek improved operating rights and over 125 have done so. The DoD witness at the AFL permanent authority application hearing indicated DoD had already agreed to support over 75 of them. Docket No. MC-129908 (Sub-No. 1), Transcript p. 44.

As to circuity, it has been established that AFL generally moves DoD's traffic from Crane, Ind., and Joliet, Ill., to Bangor, Wash., via Springfield, Mo., and Oklahoma City, Okla.—some 600 miles out of the way. See affidavit of Max Morgan attached to appellees' replies to Motions of AFL For Stay Pending Appeal, filed below and with this Court.

attempted to impress the Commission by citing tonnage figures and general origin-destination points. Of the substantial volume of traffic DoD ships, it failed to clarify what portion thereof, either by commodity or by points, required expedition and what portion had moved by rail, motor, or some other means. Not one specific instance of a service failure in existing joint-line or single-line service was enumerated.

As the lower court noted,[23] the Commission failed to rule upon protestants' motions to vacate its reopening order. In this "Hobson's choice" situation, protestants were compelled to respond to the DoD statement. These responses pointed out that DoD's generalized and indefinite complaints about the services of unnamed joint-line carriers could not be considered material to the issue of the adequacy of their services. The responses indicated that the shipments transported by the regulated carriers meet DoD's desired delivery dates and, in fact, are frequently delayed by DoD at destination where the freight remains in trailers or boxcars awaiting vessel arrival, resulting in a large waste of equipment at great expense to the carriers.[24]

On December 19, 1968, the Commission, division 1, held that on the basis of the supplemented record before it AFL had met its burden of proof for a grant of temporary authority.[25] A temporary restraining order dated

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[23] J.S. in No. 369, p. 5a.

[24] As described in affidavits of individual motor carriers attached to plaintiffs' replies to Motion of American Farm Lines For a Stay Pending Appeal, filed below and with this Court.

An example of this delay is found in the opinion of the Oklahoma district court. It refers to a DoD shipment of explosives from Crane, Ind., to Bangor, Wash., which arrived at midnight on November 19, 1968, but the tractor and trailer, along with the driver, "laid over at Bangor for unloading" for 157½ hours (until November 26). See Motion of Railroad Appellees to Affirm, p. 4A.

[25] J.S. in No. 369, App. E.

January 6, 1969, was issued by the court below, staying the effective date of this second grant of temporary authority. On March 26, 1969, the lower court entered its judgment holding the Commission's two identical temporary authority grants null and void.

Hearings by the Commission on AFL's permanent authority application (See fn. 3) will permit full consideration of its *bona fides* and fitness, and DoD's legitimate and reasonable needs. AFL has operated as a scofflaw under the guise of an agricultural cooperative transporting traffic pursuant to an exemption provision of the Interstate Commerce Act. Its member traffic has been ignored in order to serve as a for-hire carrier for the Department of Defense.[26]

ARGUMENT IN SUPPORT OF MOTION

The jurisdictional statements of both the Commission and AFL present substantially the same major and secondary issues: (1) whether the Commission was required, as a matter of law, to follow its regulations governing the processing and determination of AFL's temporary authority application and (2) whether the Commission retained jurisdiction over the proceeding to reopen it after its order was stayed and proceedings for review by the lower court were begun. Appellants' attempt to broaden the issues to include the questions as to whether the lower court applied the proper scope of review and whether the entire record contains evidence to support the Commission's orders, should not succeed, since the lower court's decision does not rest upon those grounds. The lower court did not weigh the evidence; rather it

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[26] The Oklahoma district court, holding AFL in contempt of its injunctions, found AFL's eastbound DoD shipments unlawful as neither "incidental" nor "necessary" to its members' transportation since two of AFL's members testified to overwhelming needs for the eastbound transportation services of AFL. See Motion of Railroad Appellees to Affirm, p. 11A.

found only that the applicable rules are to be enforced by the Commission as binding upon it as a matter of law.

1. In determining whether the Commission is required to follow the rules it prescribed governing motor carrier temporary authorities, the circumstances under which it acquired statutory power for granting temporary authority (TA) are important. The Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act, 49 U.S.C. § 301 *et seq.*) provided that authorization of motor carrier operations must follow complete evidentiary hearings with proof of public convenience and necessity and that these proceedings would be subject to full judicial review. A 1938 amendment, added at the request of the Commission, made a narrow exception to such procedure and permitted it to grant temporary authority without hearings at its discretion. The legislative history of the amendment is clear that the Commission was primarily seeking authority to cope with true "emergencies."[27] It was recognized that care must be taken to protect the legitimate interests of other carriers. Thus, section 210a (a) (49 U.S.C. § 310a(a)) provides two conditions precedent to the exercise of its discretion: (1) "an immediate and urgent need," and (2) "to a point or points or within a territory having no carrier service capable of meeting such need."

After 27 years of experience in the issuance of temporary authority, the Commission on its own initiative instituted a rulemaking proceeding in Ex Parte No. MC-67. Upon due consideration of the representations of interested parties, it prescribed certain rules[28] "to govern the filing, processing, and determination of applications by motor common and contract carriers for temporary

[27] The Commission's justification used as examples "[t]he bringing in of oil wells in a new field and conditions created by a flood or other calamitous visitation. . . ." Pan-Atlantic case, *supra*, 353 U.S., at 144.

[28] 98 M.C.C. 483 (1965), 49 C.F.R. § 1131.

operating authority." The rules became effective July 1, 1965, and are to remain in effect "until modified or revoked, in whole or in part, by further order by the Commission."[29] Distinctions were made in the grounds for approval of "emergency" temporary authority (limited to 30 days) and temporary authority. The rules for temporary authority provide that each application "must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers" and that "[a]ny such supporting statement must contain at least" eleven specific items of information.[30]

Several years after promulgation of these rules, the Commission, in a notice dated January 23, 1968, clarified its policy regarding the temporary authority rules.[31] Referring particularly to the supporting letters required by the TA rules, the notice stated that requests for TA "will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules."

The Commission's TA rules thus set up certain minimum standards of proof, conforming to the statutory standards of section 210a. They set forth standards which, if complied with, will constitute an administrative record which will permit the Commission to make a reasonable determination as to whether there is "an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need." Of the eleven items which each supporting letter must contain, items (8) and (9) are of special significance as essential information for an informed determination. *Acme Cartage Co.* v. *United States*, 290

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[29] 98 M.C.C. at 496.

[30] 49 C.F.R. § 1131.2(c). See J.S. in No. 369, pp. 8-9, n. 10.

[31] The notice is quoted in full in the Acme case, *infra*, 290 F. Supp. at 456-57, n. 4.

F. Supp. 453 (W.D. Wash. 1968). Items (8) and (9) are:

> (8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> (9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

In view of the Commission's action in promulgating regulations governing TA applications, we submit appellees herein were denied due process of law by its refusal to comply with them. This Court has upheld the rule that agencies must follow the requirements of their own regulations. *Service* v. *Dulles*, 354 U.S. 363 (1957); *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). Such is a basic requirement of fair play. Agency action that substantially and prejudicially violates the agency's rules cannot stand. *Pacific Molasses Co.* v. *FTC*, 356 F. 2d 386 (5th Cir. 1966); *Sangamon Valley Television Corp.* v. *United States*, 269, F. 2d 221 (D.C. Cir. 1959).

We disagree with appellant's contention that these cases are inapposite because substantial individual rights are not involved herein.[32] They are indeed; the grant of temporary authority to AFL substantially affected the rights of protesting regulated carriers and altered their future conditon by permitting large amounts of revenue and tonnage to be diverted from them.[33] Protesting regulated carriers, we submit, had a legal right to have the Commission follow its own rules and this Court should not accept the Commission's refusal to heed them. These carriers were greatly handicapped in responding to vague and indefinite allegations of service deficiencies.

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[32] J.S. in No. 369, p. 20.

[33] This is borne out by the figures cited, *supra*, p. 6, showing diversion of AFL of traffic grossing almost $10 million, over a 2½ year period.

The Commission consistently ignored the procedural and substantive requirements of its own rules. In the first instance, the Commission, division 1, acting as an appellate division, by its order of September 3, 1968, granted AFL temporary authority on the basis of the flimsiest of support letters, totally lacking in substance.[34] The administrative record at that time also included seven late-filed exhibits which AFL had attached to its petition for reconsideration but which were not authorized by the Commission's rules.[35] The Commission's action in later reopening the record to receive additional evidence gives tacit admission of its error in granting TA upon the record at that time. Furthermore, as the court below noted,[36] the Commission in its answer and brief admitted that its September 3 order "may not have been based upon evidence to support its conclusion."

Assuming, *arguendo*, the Commission retained jurisdiction over the proceeding after the district court noted jurisdiction and stayed the Commission's order of September 3, the Commission continued to ignore its own regulations. Instead of reopening the proceeding to reconsider its order of September 3, 1968, in light of the evidence of record, the Commission by summary action on its own motion preferentially permitted AFL to make its case *de novo* by inviting DoD to submit a verified statement specifying "the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by ex-

[34] The letter is attached as Appendix B hereto.

[35] As the court below noted (J.S. in No. 369, p. 7a): "Submission of supplemental data after the applications are filed is not permitted." AFL did not show cause why the exhibits were not initially adduced as evidence nor was their probative value established. These exhibits were a selective study, prepared by AFL, of seven carriers of explosives between selected points and did not begin to represent the sum total of service available to DoD for the movement of general commodities, as well as explosives, between the 14 states involved.

[36] J.S. in No. 369, p. 8a.

isting carriers." [37] The TA rules do not provide for the submission of supporting evidence beyond initial filing of shipper's statement of support. And even more important, the verified statement,[38] although more lengthy, still failed to comply with the minimum evidentiary requirements of the TA rules. Contrary to the TA rules and the Commission's order, DoD's verified statement did not specify the commodities or points for which there is an immediate and urgent need for AFL's proposed service. A presentation of factual information concerning the services of existing carriers as required by Items (8) and (9) of 49 C.F.R. § 1131.2(c), was totally lacking, and instead generalized allegations of service failures and deficiencies were substituted.

An order of the Commission granting TA is undeniably subject to judicial review, which is limited in scope to the issue of whether the Commission's determination was arbitrary or capricious or whether the Commission acted without authority of law or committed an error of law. *Hussey* v. *United States*, 271 F. Supp. 650, 653 (N.D. Cal. 1967); *Three "I" Truck Line, Inc.* v. *I.C.C.*, 246 F. Supp. 410 (N.D. Iowa, 1965).

The decision of the Commission to grant TA to AFL was without basis and constituted error in view of its total disregard of its regulations, for it was impossible for it to make a fair adjudication on the record before it. The circumstances of this administrative proceeding demand reasonable compliance. In applications for temporary authority for the provision of single-line service, as here, there is an obvious likelihood that the shipper is only expressing a preference for that service rather than an "immediate and urgent" need.[39] Furthermore,

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[37] Order of November 5, 1968.

[38] J.S. in No. 369, App. D.

[39] A specific rule (49 C.F.R. § 1131.4(b)(4)) prescribes the minimum standard of proof in this type of application:

[Footnote continued on page 16]

the Commission was not dealing with a situation where it could extract the prescribed information from multitudinous letters of support,[40] since there is only one supporting shipper here.

Contrary to appellants' argument, the ruling of the lower court is not at variance with the decisions of other district courts. Appellants in so contending refer primarily to two recent decisions: *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718 and *Superior Trucking Co.* v. *United States*, 1969 F. Carr. Cas. ¶ 82,108 (N.D. Ga.). The court in *Estes* distinguished it decision from *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968), which decision was rendered by the same lower court as herein on substantially the same grounds.[41] The court noted that, unlike the situation in

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[39] [Continued]

(4) *Single-line service.* Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

[40] The Commission in one case considered 33 letters of support in their entirety to make its determination. Roadway Express, Inc. v. United States, 263 F. Supp. 154, 158 (N.D. Ohio 1966).

[41] Circuit Judge Hamley sat in the Acme case, whereas Circuit Judge Jertberg sat on the three-judge court below. The court in Acme stated at p. 457:

Having adopted Rules emphatically requiring temporary authority applicants to provide the essential information specified in §(8) and §(9), we find it capricious and arbitrary for ICC, without good cause shown, to ignore or waive compliance with these critically important rule provisions. At a minimum, we find it so when the essential information §(8) and §(9) required to be provided does not appear elsewhere in the record.

Acme, protestants did not allege that they held themselves out to the public as providing the same type of service. Protestants did not profess to have authority to handle all of the express traffic there involved, serving all points that applicant proposed to serve, i.e., nationwide. Therefore, the court reasoned that "[i]nquiries (8) and (9) of the regulations were reasonably answered when the shippers explained why they had made no effort to obtain express service from existing carriers." 292 F. Supp., at 844. In the instant situation, protestants hold themselves out to carry the same commodities to and from the same origin and destination points as AFL.

The court in *Superior Trucking Co.* v. *United States* likewise distinguished its decision from both *Acme* and the lower court decision herein. The court there found that the thirteen supporting shipper statements, taken as a whole, together with their stated needs for "special" equipment, provided the requisite finding that no carriers were capable of fulfilling their needs. The court said that there was both substantial compliance with the regulations and other evidence in the record to support its findings. 1969 F. Carr. Cas. ¶ 82,108 at 54,545.

2. The issue raised by appellants as to whether the Commission possessed jurisdiction to reopen the administrative proceeding after the district court asserted judicial review jurisdiction and restrained the effectiveness of the Commission's grant of temporary authority is clearly not dispositive of this appeal. The lower court's judgment may be affirmed solely upon the first issue. But, dealing with the merits of the second, the Commission is "without power to act inconsistently with the Court's jurisdiction." *Inland Steel* v. *United States*, 306 U.S. 153, 160 (1939). As the court below noted,[42] the Commission, in *Central Freight Lines, Inc.* v. *Strickland Transportation Co., Inc.*, 102 M.C.C. 291, 298 (1966),

[42] J.S. in No. 369, p. 11a.

acknowledged that "when the court has exercised jurisdiction to review and suspend a report and order of the Commission, we are without power to act inconsistently." On review of the Commission's decision, in *Strickland Transportation Co.* v. *United States*, 274 F. Supp. 921, 925 (N.D. Tex. 1967), *aff'd per curiam*, 389 U.S. 574 (1968), the district court said:

> When a reviewing court has set aside administrative action found not supported by the evidence and has remanded the matter for further consistent proceedings, the Commission is without power to act except in accord with the court's mandate. Inland Steel Co. v. United States, 1939, 306 U.S. 153, 59 S. Ct. 415, 83 L.Ed. 557. . . . Courts are not procedural pawns whose opinions can be frustrated through administrative misadventure. . . .
>
> It is not pride or arrogance that makes it important that echelons, tiers, and hierarchies of courts be more than tables of organization. Our judicial system is premised on tiered decisions. We are not dealing with the trivia of a pecking order but are concerned that the words of a higher court command the respect due them.

Under the circumstances, we believe the lower court was correct in maintaining that the Commission did not have jurisdiction to reopen its proceeding for the purpose of receiving additional evidence upon which it might substantiate its prior admittedly unsubstantiated findings. The lower court pointed out that none of the cases cited by appellants deal with the question presented.[43]

Appellants' reliance on *Atchison, T. & S. F. R.R.* v. *United States*, 231 F. Supp. 422 (N.D. Ill. 1964), as supporting "the Commission's right to reopen its proceedings without leave of court, during the pendency of

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[43] J.S. in No. 369, pp. 10a-11a.

a judicial review action" [44] is misplaced. The extenuating circumstance there involved, i.e., the plaintiffs' stipulation "that further proceedings in the District Court be stayed pending the Commission's reconsideration of its original order" was all that prevented the court from holding the Commission's action to be a denial of due process. This aspect of that case, not present here, "estopped [plaintiffs] from complaining that the Commission's action in this respect was either arbitrary or unfair." [45] Here the Commission filed with the court below a motion to stay further proceedings two days *after* it reopened the proceeding before it. Although plaintiffs replied to the Commission's motion, the Commission never called it for argument. Its failure to do suggests that it recognized the invalidity of its action absent any agreement of the type involved in the *Atchison* case.

Atchison involved a situation somewhat different than that here. Here, unlike *Atchison*, the Commission, after reopening the proceeding before it, did allow replies to the "new" evidence adduced by DoD. But to rely on this case as supporting appellants is to exalt form over substance. Here, as in *Atchison*, the Commission's proceeding was reopened without prior notice to the court or the protestants. Here—unlike *Atchison*, many of the protestants challenged the authority of the Commission to reopen when its earlier order was already the subject of court review. And here the "right" exercised by some protestants to file reply to the DoD statement—after reopening was thrust upon them by the Commission—and in complete disregard of their right to subject its prior order to court review, was illusory indeed. If the Commission can cure what would otherwise be an unconstitutional invalidity in its procedure by the device em-

[44] J.S. in No. 369, p. 22; J.S. in No. 382, p. 14, n. 13.

[45] Atchison, *supra*, 231 F. Supp., at 428.

ployed here, then, it is indeed in a position to correct *nunc pro tunc* its orders in the process of judicial review, and thus effectively deny such review.[46]

CONCLUSION

The issues are not many or varied. They do not include—though appellants try to inject them—questions involving the proper scope of court review of Commission orders, or whether the Commission's action is supported by substantial evidence. Rather, the issues here are narrowly limited to the questions of (1) whether the Commission is bound by its own rules, or whether, as appellants' arguments boil down to, it has the "discretion" to ignore them when it feels so inclined; and (2) whether the Commission may frustrate court review of its decisions by reopening, without leave of court or agreement of the plaintiffs, proceedings with respect to which the court's review procedure is under way.

The cases cited herein establish that administrative agencies are as bound by their rules as are those subject to their jurisdiction. The Commission's rules were promulgated pursuant to a rulemaking proceeding, in order to assure that applicants seeking TA would adduce evidence sufficient to justify findings, required by the statute, that "an immediate and urgent need" exists for transportation which no carrier already in the field is "capable of meeting." To allow an applicant for TA rights to ignore the requirements of the rules is to deny due process to those who oppose the application

Appellants contend[47] that the lower court's decision "significantly impair[s] the Commission's ability to administer Section 210a(a) effectively . . ." Although we submit this is a highly exaggerated statement, if it has

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[46] Dixie Carriers v. United States, 143 F. Supp. 844, *vacated* "upon the suggestion of mootness," 355 U.S. 179.

[47] J.S. in No. 369, p. 16 and J.S. in No. 382, p. 8.

any validity, the remedy lies with the Commission itself. If it really believes that compliance with its TA rules significantly impairs its functions, it may change or amend them.[48] The Commission has not seen fit to do so since their promulgation in 1965.

The court below was clearly correct in holding that in the circumstances of this case "without prior leave of court, ICC was without authority to take any action which directly or indirectly might nullify or impair the jurisdiction of this court over the ICC order under review."[49] A contrary view would make a mockery of court review of agency decisions whenever an agency whose action became the subject of a complaint chose to exercise its "discretion" to—for all practical purposes—recall the case from the court in order to "cooper up" its decision under review. To paraphrase the *Strickland* court's language, courts should not be procedural pawns whose authority can be frustrated, whether by administrative misadventure or, as here, deliberate agency action.

We respectfully submit that the appellants present no substantial questions for the decision of this Court, and that the judgment and decree of the district court should be affirmed.

Respectfully submitted,

WILLIAM B. ADAMS
PETER T. BEARDSLEY
NELSON J. COONEY

Attorneys for Appellees

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[48] In Acme Cartage, *supra*, 290 F. Supp. the court states at p. 457:

> If particular rules prove overrigid or otherwise unsatisfactory in practice they can be amended as experience dictates.

[49] J.S. in No. 369, p. 8a.

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellees herein, and a member of the Bar of the Supreme Court of the United states, hereby certify that on the 10th day of September, 1969, I served copies of the foregoing Motion on the several parties hereto, as follows:

1. On the United States of America, by mailing copies in duly addressed envelopes, with postage prepaid, to Honorable Erwin N. Griswold, Solicitor General, and John H. D. Wigger, Esq., Department of Justice, Washington, D. C. 20530; and the Honorable Eugene G. Cushing, United States Attorney, and the Honorable Charles W. Billinghurst, Assistant United States Attorney, 324 Post Office Building, Tacoma, Washington 98402.

2. On the Interstate Commerce Commission, appellant, by mailing copies, in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel and Arthur J. Cerra, Esq., its Associate General Counsel, at the offices of the Commission, Washington, D. C. 20423.

3. On American Farm Lines, appellant, by mailing copies, in duly addressed envelopes, with postage prepaid, to its counsel of record, Joseph A. Califano, Jr., Esq., and John D. Hawke, Jr., Esq., 1229 19th Street, N. W., Washington, D. C. 20036; and William L. Peterson, Jr., Esq., and James M. Robinson, Esq., 401 North Hudson, Suite 200, P. O. Box 917, Oklahoma City, Oklahoma 73101.

4. On other appellees, by mailing copies, in duly addressed envelopes, with postage prepaid, to their counsel of record, William H. Dempsey, Jr., Esq., 734 Fifteenth Street, N. W., Washington, D. C. 20005; Ed White, Esq., 517 West Adams St., Chicago, Illinois 60608; and Robert E. Joyner, Esq., 2111 Sterick Building, Memphis, Tennessee 38103.

APPENDIX A

NAMES OF APPELLEES HEREIN

Alamo Express, Inc.
American Trucking Associations, Inc.
Black Ball Freight Service
Braswell Motor Lines, Inc.
Brown Express, Inc.
Central Express, Inc.
Central Forwarding, Inc.
Central Freight Lines, Inc.
Consolidated Copperstate Lines
D-C International, Inc.
Garrett Freightlines, Inc.
H. S. Anderson Trucking Co.
IML Freight Inc.
J. H. Rose Truck Line, Inc.
J. J. Willis Trucking
J. V. Harrison Truck Lines, Inc.
Miller Truck Line, Inc.
Navajo Freightlines, Inc.
Pacific Intermountain Express Co.
Red Arrow Freight Lines
Robertson Tank Lines, Inc.
T.I.M.E. Freight, Inc.
Transcon Lines, Inc.
Western Gillette, Inc.

APPENDIX B

[SEAL]

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C. 20310

U 672
JAGU 1968/9695

15 May 1968

Temporary Authority Board
Interstate Commerce Commission
Washington, D. C. 20423

Re: American Farm Lines Application for 180 Days Temporary Authority Over Irregular Routes (General Commodities and Class A and Class B Explosives)

Gentlemen:

As duly authorized counsel for the Secretary of the Army and the Department of Defense, I wish to call the Commission's attention to the following facts in connection with the above-entitled application and the desirability of the immediate issuance of temporary authority to American Farm Lines for the transportation of general commodities and Class A and Class B explosives from areas in the Middle West to the west coast and in reverse direction.

The Department of Defense is constantly looking for ways to "shorten the pipeline" of its vital military supplies. This is effected through reduced transit times between points of manufacture and warehouses, and warehouses and points of export. A speedup in transit time will bring about a greatly improved logistics effectiveness resulting in reduced cost to the Government.

The Department of Defense has used the services of American Farm Lines to transport more than 1200 shipments (Government Bills of Lading) since December

1966. Its services to the Department of Defense have been excellent in every respect. The services of this company have afforded the Department of Defense a meaningful measure, under practical conditions, of carrier capability in general. Its shorter service is necessary as both a measure and a participant in "shortening the pipeline." A sound adequate transportation system is essential to the national defense. Accordingly, the military establishment supports as many diverse carriers and routes as can be supported by the economy.

Services rendered to the Department of Defense by American Farm Lines have been provided pursuant to an "exemption" from economic regulation. However, recent court actions have resulted in interpretations of that exemption which will severely limit American Farm Lines' ability to continue to provide the service to the Department of Defense that it is currently receiving and which the Department of Defense considers desirable and necessary. Under the circumstances, if the Department of Defense is to continue to receive this extremely desirable service, an immediate grant of temporary authority is necessary. For example, since the United States District Court for the Western District of Oklahoma issued its decision on 20 February 1968, enjoining American Farm Lines from performing back to back transportation service for the Department of Defense, American Farm Lines has been required to turn down more than 700 truckloads of Department of Defense traffic. Prior to the injunction, American Farm Lines moved approximately 300 truckloads of Department of Defense freight per month. Accordingly, the Department of Defense urges the Interstate Commerce Commission to grant the temporary authority sought by American Farm Lines to assure the continued availability of its service. The Department of Defense will also support the desirability of the issuance of comparable permanent authority to American Farm Lines.

This office will be pleased to furnish any additional information that you may desire.

Sincerely yours,

/s/ Curtis L. Wagner, Jr.
CURTIS L. WAGNER, JR.
Chief, Regulatory Law Division

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*,

v.

BLACK BALL FREIGHT SERVICE, *et al.*, *Appellees*.

No. 382

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

BLACK BALL FREIGHT SERVICE, *et al.*, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

MOTION TO AFFIRM

In this motion, four of the motor carrier appellees, pursuant to Rule 16 of the Revised Rules of this Court, ask that the judgment of the District Court be affirmed on the

ground that the questions presented are so insubstantial as not to merit further argument.[1]

Questions Presented

The questions presented relate to the procedures employed by appellant the Interstate Commerce Commission in granting temporary operating authority to appellant American Farm Lines. The governing statute authorizes the Commission to grant such authority where there is an "immediate and urgent need" for a service and "no [existing] carrier service [is] capable of meeting such need." 49 U.S.C. § 310a(a). The governing regulations specify that an application for such authority "must" be accompanied by supporting statements of shippers; that those statements "must" contain a variety of data relating to the statutory standards, including particulars as to any efforts made by the shippers to obtain service from existing carriers; and that carriers contesting the application may submit written evidence in opposition. 49 C.F.R. Part 1131. In this case, the supporting shipper did not supply the specified particulars respecting its efforts to obtain service from existing carriers, although those carriers averred that in fact their service to the shipper had been unexceptionable. Nonetheless, the Commission granted the application. After the lower court temporarily stayed the Commission's order, the Commission, without permission of the court, reopened the proceeding, took additional evidence, and again granted the authority, even though the shipper again did not furnish the missing data. The questions are:

1. Were the Commission's orders infirm because of

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[1] The four appellees are Consolidated Freightways Corporation of Delaware, Riss & Company, Inc., Yellow Freight Service, and Tri-State Motor Transit Co. We understand that all other appellees except the United States will also file motions to affirm.

the Commission's failure to follow its own regulations?

2. Alternatively, should the Commission's action have been set aside because the Commission had not secured leave of court to reopen the proceeding?[2]

Statement

As the jurisdictional statements indicate, this controversy arose out of an attempt by appellant American Farm Lines ("AFL") to escape the impact of recent legislation and court orders (AFL J.S. pp. 6-7; ICC J.S. p. 6).[3] The legislation, which restricted the transportation that agricultural motor carrier cooperatives could perform for non-members while still maintaining their exemption from regulation, was based upon the Congress' finding that abuses by such carriers of their exempt status had worked serious damage to regulated carriers.[4] The court orders, which were entered by federal district court in Oklahoma against AFL at the behest of both regulated carriers and the Interstate Commerce Commission, enjoined AFL from providing as an

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[2] The record would have supported yet a third ground for setting aside the Commission's order, namely, that the Commission's action, measured against the evidence, exceeded its statutory authority. The lower court quite properly did not reach this issue—though it hinted strongly it would have decided it against the Commission (AFL J.S., App. A, pp. 11a-12a). However, were this Court to note probable jurisdiction, we would ask the Court to consider this third issue as an alternative ground for affirming the judgment below.

[3] We cite the Jurisdictional Statement in No. 369 as "AFL J.S.," and the one in No. 382 as "ICC J.S."

[4] See S. Rep. No. 1152, 90th Cong., 2d Sess. 2, 6. The basic exemption is set forth in 49 U.S.C. § 303(b)(5). The 1968 amendment to that section provides that such a cooperative may transport only such non-member traffic as is "necessary and incidental" to its service for members, and that in no event shall its non-member traffic exceed 15% of its overall interstate traffic. 82 Stat. 448. The "necessary and incidental" restriction had been judicially imposed prior to the amendment as a gloss upon the former legislation. *Northwest Agricultural Cooperative Ass'n v. ICC*, 350 F.2d 252 (9th Cir. 1965), *cert. denied*, 383 U.S. 1011.

exempt carrier various types of transportation service for the Government because such service was unlawful even prior to the legislative amendment. Since the filing of the jurisdictional statements, not only have these orders been affirmed,[5] but also the Oklahoma district court has held AFL to have been in deliberate contempt of the orders and has levied a fine of over $70,000.[6] In the contempt proceeding, as in the original actions, the Commission joined the regulated motor carriers in seeking court action against AFL.

Faced with these legislative and judicial restraints upon its burgeoning Government business, AFL filed applications for both permanent and temporary authority respecting that business. The application for permanent authority is still pending; the Commission's action on the temporary authority application gave rise to the litigation now before this Court.[7] The facts relevant to the lower court's disposition of the litigation are as follows:

1. *The Statute and Regulations.*

The Commission, of course, was called upon to measure the temporary authority application against the relevant statutory standards as implemented by the Commission's

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[5] *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, 1969 CCH Fed. Car. Cas. ¶ 82,122 (10th Cir., July 30, 1969), reproduced as Appendix D to the Motion of Railroad Appellees to Affirm.

[6] The court's opinion is reproduced as Appendix B to the Motion of Railroad Appellees to Affirm.

[7] We do not mean to suggest agreement with AFL's evident belief that, if it secured such temporary or permanent authority, it could continue simultaneously (1) to operate as an exempt carrier, and (2) to carry Government freight without regard to the section 303(b)(5) restrictions. See note 4 *supra*. As that provision is worded, the Congress did not contemplate such a hybrid operation, partly exempt and partly regulated. Accordingly, in our view if AFL's application for permanent authority is granted—or if this Court reverses the lower court's judgment respecting temporary authority—AFL will have to choose between regulated and exempt status as to all of its traffic. That question, however, is not presented on this appeal.

regulations. Before describing what the Commission did, therefore, we first outline the framework of statutory and regulatory provisions.

The statute authorizes the Commission in unusual circumstances to grant temporary motor carrier authority "without hearings or other proceedings." This departure from the procedure normally associated with applications for operating authority is permitted only "[t]o enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need . . . ." 49 U.S.C. § 310a(a). The statutory language indicates that the Congress had in mind emergency situations involving extraordinary transportation problems.[8] So does the legislative history. Thus, the Commission, in recommending the legislation, illustrated the need by referring to the "emergencies" created by "[t]he bringing in of oil wells in a new field and conditions created by a flood or other calamitous visitation . . . ."[9]

Moreover, the Commission assured the Congress that, even with respect to emergency situations, it "recognized that care would be necessary to protect the legitimate interests of other carriers . . . ."[10] The comprehensive body of regulations promulgated by the Commission to govern temporary authority applications is aptly designed to afford that protection. Those rules have the following salient features:

First, while recognizing that in some instances the "emergencies" would be so "immediate and actual" that there would be no time to publish notice of the application,[11] the

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[8] See *Pan-Atlantic S.S. Corp.* v. *Atlantic Coast Line R.R.*, 353 U.S. 436, 441 (Burton, J., dissenting).

[9] S. Doc. No. 154, 75th Cong., 3d Sess. 2-3.

[10] *Ibid.*

[11] 49 C.F.R. §§ 1131.2(d), 1131.4(b)(3).

Commission provided that in the absence of such circumstances there should be the opportunity for a limited adversarial proceeding based upon written evidence and argument. Thus, in the ordinary temporary authority case—such as the case at bar—the regulations require that notice be published and that "interested persons who can and will provide all or any part of the proposed service" be accorded the opportunity to file written protests. 49 C.F.R. § 1131.3 (a)(1), (2).

Second, to insure that those protests in rebuttal of the applicant's case can be framed with specificity, the regulations require that the submissions in support of the application provide a variety of detailed data pertinent to the statutory standards. Thus, each application must be accompanied by a supporting statement of a shipper, and this statement must set forth "at least" eleven items of particularized information that bear upon the immediacy and urgency of his need and the inadequacy of existing service. 49 C.F.R. § 1131.2(c). These regulations are set out in full in Appendix A hereto.

Third, among the categories of required information are those directly involved in this litigation:

> (8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> (9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

The information required by these subparagraphs goes directly to whether existing carriers can perform the needed service, and indirectly to the urgency and immediacy of the need. Thus, the shipper must recount in full the experiences

that have led him to conclude that existing service is inadequate. This disclosure may permit the protestants to show that the shipper's efforts have been only superficial or that the inadequacies have been insubstantial when measured against the shipper's reasonable needs. Or, since the required information relates to specific instances of allegedly inadequate service by named carriers, the disclosure may enable those carriers to dispute the allegations or mitigate their impact.

2. *Proceedings Before the Commission.*

AFL's application for temporary authority, filed on May 17, 1968, sought authority to transport general commodities for the United States between all points in a nine-state middlewestern and southern area, on the one hand, and a five-state western area on the other (R. 1716). While the application related to all Government traffic, the only supporting statement was that of the Department of Defense ("DOD"). That statement characterized AFL's service as "extremely desirable" because "[t]he services of this company have afforded the Department of Defense a meaningful measure, under practical conditions, of carrier capability in general."[12] DOD did not aver, however, that existing service was inadequate. The statement was thus consistent with two earlier letters—one to AFL and the other addressed to appellee Riss & Co. only five days prior to the date of the supporting letter—in which DOD had asserted that, while it would like to retain AFL's service, it was "not in a position to state that there would be insufficient or inadequate service without American Farm Lines."[13]

Eighty protests were filed on behalf of well over 100 motor and rail carriers, each of which asserted that it could

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[12] The letter is set forth as Appendix B to the Motion to Affirm of the other motor carrier appellees.

[13] The letters are set forth as Appendices B and C hereto.

provide some part of the service in question. The protestants also challenged DOD's statement as not complying with the regulations, said that they could not respond to the statement's generalities except with generalities, and asserted that DOD had not complained that their service had been inadequate.

The Temporary Authorities Board, on July 12, 1968, denied the application on the ground that the "applicant has not established that there exists an immediate and urgent need for any of the service proposed" (R. 1729). However, on September 3, 1968, Division 1, acting as an appellate division on AFL's petition for reconsideration, granted the temporary authority (AFL J.S., App. C).

Several protestants filed petitions for reconsideration and motions to stay the order, but the Commission denied the motions to stay (R. 1732-35) and AFL commenced operations under the temporary authority. A number of protestants thereupon brought suit in the lower court and sought a stay. After a hearing, Judge Boldt issued the stay on the basis of a preliminary showing respecting the Commission's failure to enforce its regulations relating to the DOD statement.

The Commission, on its own motion, subsequently reopened the proceedings "for the purpose of receiving a verified statement from the Department of Defense . . . ." It directed that the statement "specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers . . . ." To assure the protestants an "opportunity to reply" to this new evidence, the Commission also invited the submission of verified statements in rebuttal. (AFL J.S., App. F).[14]

[14] After it had reopened the proceeding, the Commission filed a motion in the lower court seeking a stay pending the outcome of the reopened proceeding. Commission counsel never noticed the motion for hearing,

Upon the reopening, AFL submitted a DOD statement authored by a transportation official, Vincent F. Caputo. Since the central issue in this case is whether the Caputo statement conformed to the regulations, we discuss its contents below. First, however, we complete the chronology of the Commission and court proceedings.

The protesting carriers objected again that the Caputo statement failed to comply with the regulations and that its claims of service inadequacies were so general that responses could be framed only in like generalities. Nonetheless, within the limitations imposed by the deficiencies of the Caputo statement, protestants adduced a considerable body of evidence (R. 3796 *et seq.*). Taken together, their submissions made out a case the pertinent aspects of which may be summarized as follows: First, between many of the points and as to many of the commodities in question, existing carriers did provide single-line, direct route, and/or team driver service—the sort of service DOD said it wanted to continue receiving from AFL. Second, even where that was not true, existing carriers provided a wholly adequate service. In that connection, protestants asserted that single-line, direct route service using team drivers is not necessarily superior to joint-line, regular route, single driver service, but that rather the quality of service depends upon the practices of the carriers involved. And, while disabled from rebutting with particularity the general Caputo allegations respecting service deficiencies, protestants did assert that their records showed no failure to deliver DOD traffic on time and no complaints by DOD.

Notwithstanding the lower court's preliminary determination that the original DOD statement had not complied

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however, and therefore it was never considered by the lower court. Since the Commission had not secured judicial approval of the reopening, a number of protestants petitioned the Commission to vacate its order. Those petitions were never ruled upon.

with the Commission's regulations, and despite the renewal of that claim by protestants respecting DOD's second statement, the Commission on December 19, 1968, again granted the application without even mentioning the issue. (AFL J.S., App. E). The protestants for the second time went to court.

3. *Proceedings in the District Court.*

On January 6, 1969, Judge Boldt temporarily stayed the Commission's second order. The three-judge court entered its final judgment on March 26, 1969, holding the orders null and void and permanently enjoining their operation. The court's opinion set forth two alternative grounds: (1) the Commission failed to enforce the requirements of subparagraphs 8 and 9 of 49 C.F.R. § 1131.2(c); and (2) the Commission was without authority to reopen its proceedings without prior leave of court.

4. *The Caputo Statement.*

Since the Caputo statement is the critical document in this case, we describe it in detail before reaching our argument. The statement is long and carefully composed. It repeatedly underscores the importance of the defense mission of the Department, and it provides a certain amount of detail on a variety of topics. But, if the statement is read with an eye toward the central question of compliance with subparagraphs 8 and 9 of the regulations, no amount of skillful draftsmanship can obscure the almost total want of specificity respecting DOD's allegedly unsatisfactory experience with existing carriers. The five portions of the statement relevant to this critical element of DOD's showing may be summarized as follows:

a. Having listed some fifty items as "representative" of

the "thousands" of commodities that DOD must move in "tremendous volume" in the involved states, and having asserted without specification that "a part" of this volume must be transported "in the most expeditious manner possible," Mr. Caputo states that existing carriers have not in "many, many instances" accomplished that objective. He then provides, not the instances, but three alleged reasons. (1) A "majority" of existing service is joint-line, and "[e]xperience has shown" that as to such service DOD must "in some cases" allow 24 hours for each 300 miles, whereas single-line service over direct routes with two-man driving teams "generally" takes only 8 hours for each 300 miles. But he does not say how many cases of slow joint-line service comprise the "some," nor does he identify those cases in any way. (2) "Virtually all" existing carriers move over regular routes, which are "often" circuitous. He does not say how often is "often," how circuitous is "circuitous," or how often irregular route carriers in practice operate more directly. (3) "Some" regular route carriers use single drivers rather than two-man teams, which "sometimes" causes delays because of the resulting substitution of drivers and power units during the movement. He does not say how often, how much delay, how many carriers are involved, or which points are affected. (AFL J.S., App. D, pp. 21a-23a.)

b. The next portion of the statement is evidently designed to supply the detailed evidence to support the preceding general assertions respecting the overall inadequacy of existing service. But *only three* examples are cited and even as to those examples little detail is given. Thus, for the first example DOD asserts that "some" shipments of explosives between given points by joint-line service require 6 to 11 days as against "third morning" delivery by an existing single-line carrier. Mr. Caputo does not indicate how many is "some" nor does he name the carriers. Next, on general

shipments from St. Louis to points in California, the statement contains the unsupported assertion that "'transit times' that could be afforded by carriers holding 'single line' authority for operation over irregular routes would be little more than half that now experienced through use of 'regular route' carriers." Finally, a similar comparison of existing joint-line and single-line transportation of shell cases between two points does not identify the carriers involved or indicate why DOD continues to make use of the allegedly inferior joint-line service. (*Id.*, at 24a.)

c. Mr. Caputo next identifies several special problems of DOD that allegedly are not solved through use of existing carriers. First, in "many" instances it is necessary to coordinate the arrival of inbound shipments with the production schedules of manufacturing installations. But here again only two examples are given in support of the conclusion that this is a problem that arises "many" times; only *one* example is given to show that the use of existing carriers is not adequate to solve the problem; and with respect to that example the statement does not identify the carriers that allegedly have performed unsatisfactorily. Next, where shipments are assigned to specific vessels or aircraft for trans-shipment, "DOD has experienced situations" in which existing carriers failed to deliver in time. But only one "concrete example" is provided, and as to that the allegedly defaulting carriers are not named and there is no indication as to how often they allegedly defaulted. The third problem is that, although "at times" it is "desirable" to make up truckload shipments of mixed commodities, in "many" cases existing carriers lack authority to transport one or more of the commodities. How often such shipments are refused, which carriers are involved, and how urgent a problem it is are questions left unanswered. (*Id.*, at 28a-30a.)

d. The statement cites five examples of AFL's "excellent" service. In each case, AFL was able to make delivery within the required time, whereas "based upon [DOD's] experience" no existing carrier could have met the deadline. But the carriers that allegedly could not have performed are not identified; there is no indication whether they were asked; nor is there any description of the "experience" upon which DOD's judgment was assertedly based. (*Id.*, at 31a-33a.)

e. Finally, even though existing service may be adequate for some commodities between certain points, "any transportation system which is largely comprised of carriers holding 'bits and pieces' of authority . . . is inherently inefficient." The statement cites no instance in which the "bits and pieces" system was responsible for service failure, nor does it undertake to support its conclusion in any other way. (*Id.*, at 25a.)

It was upon the basis of these generalizations, supported by this sparse citation of facts, that DOD alleged that existing carriers have failed to provide reliable, efficient, and expedited service and have accordingly been unable to meet DOD's imperative shipping needs. And it was upon the basis of this allegation that the Commission in large measure rested its decision. Thus, the Commission's final order recites that DOD established "[t]hat it has experienced inefficient and circuitous joint-line transportation by the use of existing carrier services which have been deficient for its needs . . . ." (AFL J.S., App. E, p. 36a.) In so concluding without requiring DOD to comply with the governing regulations, as we now show, the Commission erred.

Argument

The decision of the lower court rests upon two rules of incontestible validity. The first is that, where an agency promulgates regulations securing important interests of

parties to adjudicatory proceedings, the agency may not lift those regulations in particular cases without good cause. Appellants' suggestion that this principle may not apply to regulations of the sort here involved is clearly wrong, as we show below. Commission counsel's main effort, however, is to demonstrate either that in fact the regulations were followed or that there was good cause for non-compliance. While we demonstrate that both contentions are wrong, we also show that this Court need not resolve those questions, for the Commission itself did not so much as hint that its action was based upon the position now advanced by counsel.

Alternatively, the lower court held that the Commission had no authority to reopen the proceeding and issue its new order without the consent of the court. As we will demonstrate, every court that has spoken to this general question, including this Court, has taken the same view as the lower court respecting the jurisdiction of the Commission as well as other administrative agencies once judicial review has been properly invoked. Moreover, we also show that this view is as sound in principle as it is firmly grounded in precedent.

I

The Lower Court Did Not Err in Holding the Commission's Orders Infirm Because of the Commission's Failure to Enforce Its Own Regulations.

This Court has established and consistently applied the important principle of administrative due process that an executive agency must scrupulously observe its own rules and regulations. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260; *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Yellin* v. *United States*, 374 U.S. 109.

The lower federal courts have vigorously enforced this canon against the various administrative agencies, including the Interstate Commerce Commission.[15] In accordance with this principle, the District Court held that the Commission's action was invalid because it failed to enforce its own rules governing the information required of the supporting shipper.

Appellants advance the threshold contentions that the regulations here involved are not binding, that they cannot narrow the Commission's statutory discretion, and that in any event they may be ignored when the record contains any evidence to support the Commission's order. Beyond that, however, they suggest that the rules were either substantially complied with or waived with good cause. Each of these arguments is without merit.

A. *The Regulations Are Binding on the Commission.*

1. Appellant AFL seeks to distinguish *Service* and *Accardi* on the ground that the regulations here were meant to confer no rights upon protesting carriers but only to facilitate the Commission's handling of temporary authority applications (J.S. pp. 20-21 & n. 19). The Commission conspicuously declines to make this argument (J.S. pp. 9-10), and for good reason. This Court rejected the same contention in analogous circumstances in *Yellin* v. *United States,* 374 U.S. 109, a case that involved the alleged viola-

[15] See, *e.g., Hammond* v. *Lenfest,* 398 F.2d 705 (2d Cir. 1968) ("a validly promulgated regulation binds the government as much as the individuals subject to the regulation"); *Upjohn Co.* v. *Pennsylvania R.R.,* 381 F.2d 4 (6th Cir. 1967) (ICC has no power to waive its own rules of practice); *Pacific Molasses Co.* v. *FTC,* 356 F.2d 386 (5th Cir. 1966) (rules promulgated by an administrative agency "must be scrupulously observed"); *Sangamon Valley Television Corp.* v. *United States,* 269 F.2d 221 (D.C. Cir. 1959) ("Agency action that substantially and prejudicially violates the agency's rules cannot stand"); *Mississippi Valley Barge Line Co.* v. *United States,* 252 F. Supp. 162 (E.D. Mo. 1966), *appeal dismissed,* 385 U.S. 32 (ICC action invalid unless pertinent rules are followed).

tion of a House Un-American Activities Committee rule requiring, in certain circumstances, that a witness be interrogated initially in executive, rather than public, session. The Government took the position that the Committee's rule "was written to provide guidance for the Committee alone and that it was not designed to confer upon witnesses . . . the right to have the Committee act . . . according to the standards set forth in the rule." *Id.*, at 115. The Court rejected the argument after concluding that the structure of the Committee's rules and the history of its practice reflected an intent "to assure a witness fair treatment . . . ." *Id.*, at 116.

Likewise, an examination of the Commission's temporary authority rules reveals that they are designed, not only for the Commission's guidance, but also to carry out the Commission's representations to the Congress that it would "protect the legitimate interests of [protesting] . . . carriers . . . ." (See page 5 *supra*.) As we have shown in detail above, the rules assure those carriers a meaningful opportunity to reply to the claims of the applicant and the supporting shipper by requiring answers to the kind of questions that might be asked on cross-examination. As we have also shown, subparagraphs 8 and 9 (the ones the Commission was found to have ignored) are critical elements in this scheme because they are designed to elicit information regarding specific service failures, information that existing carriers are in a unique position to discredit. The importance of that information is perhaps most clearly illustrated by the prejudicial effect of a shipper's failure to provide it. As we demonstrate below (pages 28-29 *infra*), that effect in this case was substantial. Finally, we need not look far for evidence of the Commission's own practices respecting the rules; one of its stated reasons for reopening the proceedings herein was to afford the protestants "an opportunity to reply" to DOD's new claims (AFL J.S.,

App. F. p. 40a). Thus, there can be no serious doubt that, under the *Yellin* standards, the *Accardi-Service* principle fully applies to the temporary authority rules.

It merits notice that the lower federal courts have consistently applied the same test as that used in *Yellin* and have permitted departure from agency rules only where they are clearly unrelated to the agency's decision-making and information-gathering functions. *Compare, e.g., Herak* v. *Kelly*, 391 F.2d 216 (9th Cir. 1968) (enforcing rule whose purpose "is to enable [the employee] . . . to make an effective administrative appeal"); *Atlantic Coast Line R.R.* v. *United States*, 173 F. Supp. 871 (E.D. Va. 1958) (ICC could not waive rule that afforded an "opportunity to reply to the petition seeking a reconsideration"), *with McKenna* v. *Seaton*, 259 F.2d 780 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 835 (non-compliance with a rule whose purpose was not related to decision-making held to have no special significance to a fair and reasonable administration of the laws).

2. Both appellants also suggest that, for some unexplained reason, the regulations cannot be applied in derogation of the discretion committed to the Commission by the temporary authority statute. Thus, the Commission objects that the lower court's decision "will impose more rigid standards on the grant of temporary authority than the summary procedures envisioned by the statute" (J.S. p. 10). And, in a variant of this approach, AFL argues that "the lower court failed to apply the proper scope of review," and that regardless of the regulations the lower court was obliged to affirm the Commission's order if there was "any evidence in the administrative record" supporting that order (J.S. p. 18). These arguments are manifestly incorrect, for they are based upon the supposition that an agency may not limit its statutory discretion by promulgation of regulations.

That the agecy *may* so restrict its own power, however, is clear from *Service*, where the Court held the Secretary of

State to his own rules regarding the discharge of an employee from the Foreign Service, a matter in which the Secretary, by statute, had "absolute discretion."

> While it is of course true that . . . the Secretary was not obligated to impose upon himself these more rigorous . . . standards, neither was he prohibited from doing so . . . and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them. (354 U.S., at 388.)

In *Vitarelli*, the Court went even further. The Secretary of the Interior had dismissed an employee on charges that his employment was contrary to the best interests of national security. Because of his status in the Department, the employee *could* have been dismissed summarily and without cause.

> Since, however, the Secretary gratuitously decided to give a reason, and that reason was national security, he was obligated to conform to the procedural standards he had formulated for the dismissal of employees on security grounds. (359 U.S., at 539.)[16]

There is, of course, no question that the Commission enjoys statutory discretion in the matter of temporary authority applications. But neither is there any question that the Commission, by promulgating its temporary authority regulations, defined the manner in which it would exercise that discretion. Having imposed these standards upon itself, the Commission cannot proceed without regard to them.

Nor is AFL's variant of the argument any more persuasive. Certainly, *Accardi* and *Service* do not contemplate that

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[16] And see *Hammond* v. *Lenfest*, *supra* note 15, 398 F.2d, at 715 (a valid regulation is no less binding when action is discretionary); *Sheridan-Wyoming Coal Co.* v. *Krug*, 172 F.2d 282, 288 (D.C. Cir. 1949) (wide discretion does not include discretion to violate applicable regulation).

the Commission's obligation to comply with its own rules ceases the moment it receives any evidence upon which to base its decision. We are not here concerned with the scope of review of the Commission's order. The question here is whether the Commission must adhere to the rules governing its decision-making and information-gathering functions. As to that, even if there were substantial evidence in the record supporting the Commission's action, it must still be overturned if important regulations were violated. That was the precise holding of *Camero* v. *United States,* 345 F.2d 798 (Ct. Cl. 1965), the one case that expressly states what is implicit in countless others.

B. *The Commission's Order Cannot Be Sustained Either on the Ground of Substantial Compliance With the Regulations or on the Ground of Waiver for Good Cause.*

The principal objection of appellant Commission to the decision below is that it "exalts form over substance" (J.S. p. 9). That argument appears to be made under two heads. First, appellant contends that the court required "literal" rather than "reasonable" compliance with the regulations (J.S. pp. 8-9, 12). As we understand it, this implies that there was in fact substantial, albeit not literal, compliance by DOD with the regulations. Second, appellant contends that the court should not have "[r]equired the supporting shipper to perform the futile gesture of appealing to existing carriers for service which they do not and can not perform under their franchises" (J.S. p. 9). As we understand it, this comes to the rather different, evidently alternative, argument that, although the DOD statement did not comply with the regulations either literally or substantially, there was good cause for waiving this default.

While the "form over substance" aphorism has a nice ring, it has nothing to do with the decision of the lower

court. That court did not reject the established principle that only substantial, rather than literal, compliance with regulations is required,[17] and that even substantial compliance can be waived for good cause shown.[18] To have done so would have been to go back on a prior opinion of the same court, written by the same author, and involving the same regulations. That opinion stated as the governing principle that there must be "enforcement of reasonable compliance" unless there is "good cause shown" for waiver. *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453, 457 (1968). But the lower court did not cast doubt on *Acme*. On the contrary, the court expressly relied upon it (see AFL J.S., App. A, pp. 6a, 12a).

To be sure, the lower court did not explicitly treat questions of substantial compliance or good cause waiver. But that is understandable, since these contentions by appellants were, and are, wholly insubstantial, as we now demonstrate.

1. The Commission's order, in the first place, cannot be sustained on either the substantial compliance or the good cause waiver theory, because the Commission itself did not in its order endorse either theory explicitly or implicitly. Since the court had already, in issuing its first stay, highlighted the non-compliance with regulations issue, if the Commission believed that there was substantial compliance or good cause for waiver, presumably it would have said so. The court was not compelled to entertain Commission counsel's "*post hoc* rationalizations" respecting the Commission's action; indeed, to have done so would have been error. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168; *SEC* v. *Chenery Corp.*, 318 U.S. 80.

2. Moreover, there was in fact no substantial compliance.

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[17] *E.g.*, *Mendelson* v. *Macy*, 356 F.2d 796, 801 (D.C. Cir. 1966).

[18] *Wyszatycki* v. *FCC*, 267 F.2d 676 (D.C. Cir. 1959); see, *e.g.*, *NLRB* v. *Albritton Engineering Corp.*, 340 F.2d 281, 285-86 (5th Cir. 1965), *cert. denied*, 382 U.S. 815; *NLRB* v. *Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953).

Subparagraphs 8 and 9 in effect require the answers to five questions:

(a) Have efforts been made to obtain the service from existing carriers?

(b) If so, what were the dates of such efforts?

(c) What were the results of those efforts?

(d) What are the names and addresses of existing carriers who have either failed or refused to provide the service?

(e) What reasons were given for those failures or refusals?

Mr. Caputo makes quite clear that DOD has had vast experience with existing carriers in the territories involved and alleges that the experience has been markedly unsatisfactory. That is, "yes" to question (a), "unfavorable" to question (c). However, as we have shown in detail above (pages 10-13 *supra*), nowhere in his statement are the required details given as to a single service failure or refusal: no dates, no names, no addresses, no reasons given by the guilty carriers. Mr. Caputo does not even undertake to summarize the necessary information. There is no indication of how many times DOD has experienced service failures, over what routes, or with regard to which commodities. In short, none of the specific information required by the regulation is provided in the statement. It contains only the general conclusions and vague assertions that the rules were designed to penetrate. By no stretch of the imagination can this be deemed reasonable compliance.[19]

[19] Although DOD did not claim that it was unable to comply literally with the regulations, if it had made such a claim doubtless less than literal compliance would have been acceptable. Because of the volume of traffic and the number of routes involved in AFL's application, a detailed recording of service failures over past decades would obviously be unmanageable. What would be required is some effort to particularize the alleged failures

3. Nor is counsel's good cause waiver argument well taken. The contention is rooted in the notion that the service provided by AFL is, for one reason or another, unique. Since no certificated carrier can offer that service, the argument runs, it would have been bootless to require Mr. Caputo to recount DOD's unsuccessful efforts to obtain it.

Since every effort of Commission counsel to salvage the order by identifying one or another "unique" feature of AFL service founders either on the facts of record or on Commission regulations indicating that the feature is not unique, it is hardly surprising either that the Commission did not adopt this theory in its order or that counsel are now rather less than precise in formulating it. The detail of the theory, and its flaws, are as follows:

First, counsel assert that AFL's service is single-line, and that no existing carrier can match it with joint-line operations (ICC J.S. pp. 3, 12). But as counsel are compelled to concede, the Commission's own rule "provides that a desire for single-line service is insufficient to grant temporary authority" (J.S. p. 12 n. 9).[20] Accordingly, as they are also compelled to concede, protestants' claims that their joint-line service was sufficient presented "questions of fact for determination by the Commission" (J.S. p. 12), not a question of law that could be determined simply by

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in a given period of, say, six months, or perhaps a complete and detailed summary of those failures, including the carriers, routes, commodities, and time period involved.

[20] "(4) *Single-line service.* Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved." 49 C.F.R. § 1131.4 (b)(4).

reference to the presence or absence of single-line service. Moreover, Mr. Caputo recognized, and many of the protestants asserted, that existing carriers offered single-line service between many points in the involved states (see AFL J.S., App. D, pp. 22a-25a).

At another point, counsel suggest that the uniqueness of AFL's service consists of its ability to employ irregular routes in its single-line service (J.S. p. 3). Again, however, there is nothing inherently superior about irregular route service. It is certainly a question of fact whether the regular route carriers are able to move as, or more efficiently than the irregular route carrier in question. In any event, existing carriers offered irregular route service between some points, as is implied in the Caputo statement itself (see *id.*, at 23a, 24a).[21]

Ultimately, perhaps, counsel rest upon the "completeness" of the service offered by AFL (ICC J.S. pp. 4 n. 3, 12). That is, even if existing carriers can provide the desired service between certain points in the involved states, a transportation system consisting of such "bits and pieces of commodity and geographical authority" is "inherently" inefficient (J.S. p. 5), and that inherent inefficiency justifies a grant of temporary authority to a carrier that will not be disabled by these limitations.[22]

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[21] The same can be said of a combination of single-line, irregular route, and two-man driving team service, of which Mr. Caputo spoke highly but which Commission counsel do not mention. A number of joint-line, regular route, single driver carriers claimed that their service could match that of AFL, while at least one other carrier claimed to offer precisely the combined service referred to by Mr. Caputo (see page 9 *supra*).

[22] It is noteworthy that, although Mr. Caputo characterizes the "bits and pieces" system as inherently inefficient, he simultaneously emphasizes that AFL's service is used to complement rather than replace the existing system and that "collectively these services have proven adequate . . . ." (AFL J.S., App. D, p. 31a.) Apparently, AFL is but another piece of the "bits and pieces." If the system is inherently inefficient, it is difficult to understand how adding to that system can render it adequate.

Had the Commission itself adopted this extraordinary view, the question presented to the lower court would surely have been different, for under counsel's approach the temporary authority statute is turned on its head. Instead of permitting grants of such authority only in cases of genuine emergency where no carrier can afford reasonably adequate service, the statute would apply to situations where there is full service available from a number of carriers for every commodity between every origin and every destination but where the shipper finds it more convenient to deal with a single carrier that could fully serve all points in a multi-state region.

But the Commission, as to this matter at least, was evidently guided both by the statute and by its own regulations. Those regulations stand squarely in the way of the "complete service" contention suggested by counsel. They provide in pertinent part that "[r]equests for temporary authority on the basis of 'providing a complete service to a shipper,' even though existing carriers are participating in the traffic . . . require special justification," and that "[g]enerally . . . the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper in their authorized territories . . . ." [23] Thus, not only is there nothing inherently superior about "complete service" within the meaning of the temporary authority statute, but the Commission's own rules create

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[23] "(5) *Complete service.* Requests for temporary authority on the basis of 'providing a complete service to a shipper,' even though existing carriers are participating in the traffic and in many instances can provide a substantial part of the service, require special justification. Generally, in such instances, the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper in their authorized territories, or that the supporting shipper has revised its distribution methods to such an extent that there actually is an immediate and urgent need for the complete service proposed." 49 C.F.R. § 1131.4(b)(5).

a strong presumption against basing a grant of authority upon the shipper's desire for such a service.

In short, it is clear, as Commission counsel finally recognize (J.S. p. 12), that AFL's application, DOD's claims, and protestants' submissions presented questions of fact: whether the kind of service offered by AFL was in fact more expeditious than existing service, and, if it was, whether DOD in fact had an imperative need for that expedition between all points and for all commodities. In support of the application, DOD made numerous statements regarding the inadequacies of existing service and those claims were relied upon by the Commission in granting the temporary authority. It is precisely in such circumstances that subparagraphs 8 and 9 of the pertinent regulation come forcefully into play to assure the protesting carriers a meaningful opportunity to reply. There is no justification for waiving those requirements; there is every reason to enforce them vigorously.

4. In arguing substantial compliance and good cause, appellants rely on *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718. That case, however, was altogether different from this one.

When the railroad that was Railway Express Agency's link between Washington, D.C., and Richmond, Virginia, gave notice that it would discontinue its less-than-carload express shipments, REA applied for temporary authority to continue its shipments by truck. REA submitted supporting statements from eleven shippers, each of whom stated: "I am currently obtaining the service I need from REA Express, and, accordingly, have had no occasion to seek express service from anyone else." The protesting carriers challenged the Commission's grant of temporary authority on the ground that the supporting statements did not conform to the requirements of 49 C.F.R. § 1131.2(c)(8)

and (9). The District Court properly upheld the Commission, and this Court affirmed summarily. It is clear that the supporting statement complied *in full* with the regulations. The shippers had never had occasion to seek other service, since REA provided express service without interruption. Thus, they correctly answered the threshold question by saying that they had *not* made efforts to obtain the service from existing carriers. There could have been no other answer, and, of course, the other questions were thereby rendered inapplicable. Thus, the order could not have been set aside for want of compliance with the regulations. The only genuine question was whether the applicant had in fact introduced evidence sufficient to warrant the findings required by the statute.[24]

Our case is quite different. The question is not whether the evidence was sufficient, but whether the regulations were followed. As to that, the DOD statement, in contrast to the statements of the REA shippers, makes entirely clear that

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[24] The regulations do not require that the supporting shipper make efforts to obtain service from existing carriers; rather, they assure that if such efforts have been made the required details are given, and that if no efforts have been made that fact is revealed. To be sure, in the normal case the failure of the shipper to have sought service from existing carriers will be fatal. That is, a "no" answer to the initial question of subparagraph 8 will ordinarily mean that the applicant will be unable to demonstrate the inadequacy of existing service; the application will thus fail, not for noncompliance with the regulations, but for failure of proof under the statute.

In *Estes*, however, that was not the result, because REA's nationwide express service was qualitatively different from any existing service. As the Solicitor General argued to the Supreme Court in that case: "[T]he courts and the Commission have repeatedly recognized the differences between the express service performed by carriers such as REA and the ordinary freight service performed by general commodities motor carriers, such as appellants. *Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328, 332-333 (D. Mass.), affirmed *per curiam*, 376 U.S. 514; *REA Extension—Nashua, N.H.*, 91 M.C.C. 311, 324, 340-341; *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 579-583; *Mistletoe Express Service Extension—Texas*, 61 M.C.C. 735, 744-745; *REA Extension—Durant-Kosciusko*, 34 M.C.C. 111, 114." Motion to Affirm, pp. 4-5.

DOD has had vast experience with existing carriers. Thus, as opposed to the REA shippers, DOD could not truthfully have answered "no" to the threshold question. Accordingly, in contrast to the REA shippers, DOD was required to detail that experience in some reasonable manner in order to give protestants a chance to respond to the charges that their service was inadequate.

Another case relied upon by appellants, *Superior Trucking Co.* v. *United States*, 1969 CCH Fed. Car. Cas. ¶ 82,108 (N.D. Ga., June 4, 1969), is similarly distinguishable. The court there emphasized that the supporting shippers' statements "catalog the efforts made, without success, to secure plaintiffs' services." The court's brief summary of that cataloging speaks for itself;[25] under those circumstances, the court properly found substantial compliance with the regulations.

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[25] "Congaree Iron and Steel Company stated that although they have used Moss Trucking and Home Transportation on occasion, neither generally has had sufficient equipment of the type required at the times and places needed. Congaree gives specific dates when Home Transportation was called for service and also states that Moss was called on numerous occasions. Owen Joist Corporation stated, in a November 4, 1968, communication that it had contacted all of the plaintiffs over the past few days but none had the necessary equipment presently available. Owen Steel Company stated, in a December 11, 1968, letter that it had called plaintiffs but none had trailers at present. Dixiana Steel Company stated that they were unable to use Superior Trucking, one of the plaintiffs, due to the unavailability of the necessary equipment, and Moss due to their remote location. Owen Electric Company stated that both Superior and Home Transportation advised them that it would be one week or longer before they could furnish the necessary equipment, and that while on occasion Home Transportation furnished some units, they did not have enough to handle Owen Electric's requirements. Owen Miscellaneous Metals, Inc. contended there was no specialized carrier within 100 miles of its plant, with the exception of Equipment Transport. Kline Iron and Steel Company and Allcraft Steel Company both stated they did no business with Superior in 1968 because of the unavailability of their service. R. B. M. Metals Company stated that to its knowledge only Equipment Transport had the equipment to serve their needs, and Colonial Iron Works, Inc. and Steel Specialty Corporation said much the same thing."

C. *Appellees Were Prejudiced by the Commission's Non-Compliance.*

Appellant AFL suggests that "the ICC's departure from these regulations could not conceivably prejudice competing carriers," because those carriers had "ample opportunity to submit their own evidence, and to secure judicial review based upon the entire record" (J.S. p. 20 n. 19).

Assuming that a showing of prejudice is essential,[26] the protesting carriers were in fact seriously prejudiced. Although DOD asserted that its experience with existing carriers was unfavorable, and although the Commission relied upon those assertions, no carriers were named, no dates were given, no specific identification was made of even one actual service failure. The protestants, who claimed the capability of providing the needed service, were thus deprived of their opportunity to mitigate or dispute the facts upon which DOD relied.

That this deprivation was harmful is indisputable. Had the required information been given, it might have developed, for example, that only a very small part of DOD's traffic must move with special speed, that the "many, many instances" in which existing service has failed amounted to only 15, that the "some" cases in which joint-line service takes 24 hours per 300 miles have really been only a handful—in short that the service failures were greatly overstated. Moreover, with specific cases of alleged failures before them, the protestants might have been in a position to submit documentary evidence to dispute the facts. (Even on the meager factual presentation in the Caputo statement,

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[26] Although the rule has been stated to include a *prejudicial* violation of agency regulations, *e.g., Sangamon Valley Television Corp.* v. *United States, supra* note 15, 269 F.2d, at 224, the one court squarely presented with the issue declined to pass on it. *Pacific Molasses Co.* v. *FTC, supra* note 15, 356 F.2d, at 387 n. 3.

several carriers were able to find careless misstatements and overbroad generalizations.) Certainly, it cannot be supposed that the outcome of this proceeding could not have been different. Presented with a catalog of the alleged service failures and with the denials or explanations of the carriers involved, the Commission might well have found itself unable to conclude that existing service was inadequate or that DOD's need was imperative. In such circumstances, appellees were "at least entitled to have the [Commission] follow its rules and give [them] consideration according to the standards it has adopted . . . ." *Yellin* v. *United States, supra,* 374 U.S., at 121.

D. *The District Court's Holding Does Not Hamper the Commission.*

The Commission and AFL repeatedly intimate that the decision below will seriously impair the Commission's ability properly to exercise its discretion under 49 U.S.C. § 310a(a). It is not easy to see why this is so, since even as the regulations stand, they can doubtless be waived for good cause. In any event, as Judge Boldt pointed out in *Acme Cartage:* "If particular rules prove overrigid or otherwise unsatisfactory in practice they can be amended as experience dictates." 290 F. Supp., at 457. Having imposed upon itself the procedural rules in question, however, the Commission cannot, "so long as the Regulations [remain] unchanged, proceed without regard to them." *Service* v. *Dulles, supra,* 354 U.S., at 388.

II

The Lower Court Did Not Err in Setting Aside the Commission's Order Because the Commission Had Failed to Secure Authorization of the Court to Reopen the Proceeding.

The lower court, as an alternative basis for its decision, held that the Commission had exceeded its authority in reopening the proceedings to receive additional evidence without leave of court. As to this issue, these undisputed facts are crucial: (1) When the litigation was instituted the district court properly acquired jurisdiction, as the Commission concedes (J.S. pp. 15-16). (2) In its answer, as well as in its brief below, the Commission conceded that its first order granting the temporary authority "may not have been based on evidence to support its conclusion" (AFL J.S., App. A, p. 8a). If the matter had rested there, the order clearly could have been set aside on this ground. (3) The court preliminarily enjoined that order from going into effect (*id.*, at 4a). At that point, in sum, jurisdiction had vested in the court; the court had exercised its jurisdiction by staying the Commission's order; the Commission and appellees were before the court as opposing litigants with respect to the validity of that order; and the order, as the Commission was in effect to concede, was invalid for want of evidentiary support. (4) The Commission thereafter, on its own motion and without consent of the court, reopened the proceedings "for the purpose of receiving" additional evidence from DOD and any rebuttal evidence (AFL J.S., App. F, p. 40a). (5) After receiving that evidence, the Commission reissued an order identical to the order that had been stayed, and then returned to court urging that the new evidence salvaged its case.

Under these circumstances, the lower court held that the Commission had exceeded its authority in reopening the proceedings without consent of court. That holding was correct under the decisions of this Court and lower federal courts, as we now show. Moreover, as we also show, the holding is sound in principle. The purpose of the requirement of judicial supervision is to restrain any temptation of the Commission, once it is in a litigating stance, to act as a litigant while purporting to act as a quasi-judicial tribunal.

The applicable rule was laid down in *Inland Steel Co.* v. *United States*, 306 U.S. 153. There the District Court had issued an interlocutory injunction staying an ICC order subject to certain conditions and the Commission subsequently entered an order suspending its original order. It was argued that this second order had deprived the court of jurisdiction to enforce the conditions it had imposed. This Court said:

> [S]ince the court had exercised jurisdiction to review and suspend the Commission's report and order, the administrative body was without power to act inconsistently with the court's jurisdiction .... (*Id.*, at 160.) [27]

To be sure, the facts in *Inland Steel* were not the facts here, and the principle was stated in terms general enough so that we cannot reasonably contend that one need only read the passage in *Inland Steel* to decide the case at bar. However, *Inland Steel* is important in two respects. First, it established, contrary to the Commission's apparent position in the case at bar, that there is *some* significant limita-

[27] On the facts of the case, the Court went on to construe the Commission's second order as merely a recognition of the court's injunction (306 U.S., at 160).

tion upon the power of the ICC once judicial review is invoked. And, second, in citing as relevant precedent a prior decision of this Court relating to the NLRB (*id.*, at 160 n. 13), the Court in *Inland Steel* suggested that the character of this limitation may be the same for the ICC as for the NLRB.

The decision cited was *Ford Motor Co.* v. *NLRB*, 305 U.S. 364. There the National Labor Relations Board had sought to withdraw a petition for enforcement of an order after an intervening decision by this Court apparently had persuaded the Board that enforcement would be denied unless certain errors were corrected. The Court held that, from the time the petition for enforcement was filed, the Board lost authority to modify its order (*id.*, at 368) and had no right to withdraw its petition except with the consent of the reviewing court:

> Considering the scope and purpose of the jurisdiction of the court in a proceeding under §10(e) [of the National Labor Relations Act] and the position and rights of the person proceeded against, we are unable to conclude that the Board has an absolute right to withdraw its petition at its pleasure. We think that permission to withdraw must rest in the sound discretion of the court to be exercised in the light of the circumstances of the particular case. (*Id.*, at 370.)

Cf. United States v. *Morton Salt Co.*, 338 U.S. 632, 643.

Clearly, if the *Ford Motor* doctrine is controlling in the case at bar, the Commission exceeded its authority. In judging the relevance of that doctrine, it is important to note that the statutes governing judicial review of most other federal agencies are substantially the same as that construed in *Ford Motor*.[28] Where an agency maintains that

[28] *E.g.*, 15 U.S.C. § 45(c) (Federal Trade Commission); 15 U.S.C. § 717r(b) and 16 U.S.C. § 825l (Federal Power Commission); 47 U.S.C. § 402 and 28 U.S.C. §§ 2341-2347 (Federal Communications Commission); 49 U.S.C. 1486 (Civil Aeronautics Board).

it is untouched by limitations imposed upon other agencies by the Congress and the Court, it should be able to cite either a clear, even if perhaps inexplicable, legislative discrimination in its favor or a compelling policy reason for according it a unique status. But the ICC can cite neither.

As to the pertinent legislation, it is true that the statutory review provisions governing orders of these other agencies are in some respects different from those relating to the orders of the ICC.[29] Thus, as to these agencies the statutes provide that, if a party wishes to introduce further evidence, it must secure the approval of the reviewing court; and the statutes also say that the court in which a petitioning party files the transcript has "exclusive" jurisdiction. But those differences are not determinative. The "exclusive jurisdiction" provision can as readily be regarded as identifying the reviewing forum among the various federal courts as defining the court's relation to the agency. Indeed, that is precisely how this Court viewed the provision in *Cheng Fan Kwok* v. *Immigration & Naturalization Service*, 392 U.S. 206, 209-10. And the provision respecting introduction of evidence was obviously necessary because as to these agencies review was centered in the courts of appeals, which have no fact finding powers, rather than in the district courts.[30]

Moreover, these statutory provisions were not regarded by this Court as dispositive in *Ford Motor*, where the NLRB did not place its request to reopen the proceeding upon a desire to receive more evidence. Thus, while the Court na-

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[29] For the NLRB, see 29 U.S.C. §§ 160(e) and (f). For the other agencies, see note 28 *supra*. For the ICC, see 28 U.S.C. §§ 1336, 2321-2325.

[30] We have reviewed the legislative history of the statutes cited in footnotes 28 and 29 *supra*. Contrary to appellants' argument, there is no suggestion whatsoever that the Congress intended to establish any different rule with respect to the exclusiveness of the court's jurisdiction when it is reviewing an order of the ICC than when it is reviewing an order of any other agency.

turally rested in part upon these provisions as indicating in a general way the status of the court in a judicial review proceeding, it also pointed to the underlying policy consideration—"the position and rights of the person proceeded against." *Id.*, at 370. As to that consideration, there is of course no warrant for regarding the ICC as different from any other agency.

With respect to lower federal courts, virtually every decision that is in point is in accord that an administrative agency, including the ICC, cannot reopen quasi-judicial proceedings after the reviewing court has assumed jurisdiction except with the consent of the court. In this connection, AFL's reliance on *Atchison, T. & S.F. Ry.* v. *United States*, 231 F. Supp. 422 (N.D. Ill. 1964), is curious indeed. According to AFL, that decision "expressly upheld . . . the Commission's right to reopen its proceedings without leave of court during the pendency of a judicial review action" (AFL J.S. p. 22). Quite to the contrary, the court in the *Atchison* case severely criticized the action of the Commission in reopening the proceedings. A large part of the court's opinion is devoted to a lucid statement of the very policy consideration upon which we rely—the possibility that, under the guise of reconsidering its action, the agency may simply attempt to recapture its litigating position if it is able to reopen its proceedings without court supervision. *Id.*, at 428. Indeed, the court stated that this consideration "might well be controlling and demand" that the Commission's order be set aside were it not for the fact that the plaintiffs had waived such a claim. *Id.*, at 428-29. In the instant case, of course, there was no such waiver. Rather, appellees pressed the point before the court below and before the Commission.

Anchor Line, Ltd. v. *FMC*, 299 F.2d 124 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 922, is another decision relied upon by appellants that actually supports the decision of the district court herein. There, after a complaint had been filed

to review an order of the Maritime Commission, the Commission reopened its proceedings and reversed itself. In a subsequent action brought by a competitor of the plaintiff in the first proceeding, the court said:

> It is true that when an agency seeks to reconsider its action it should move the court to remand or hold the case in abeyance pending reconsideration by the agency. See Wrather-Alvarez Broadcasting Co. v. Federal Communications Commission . . . (248 F.2d 646 (D.C. Cir. 1957)). Cf. Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952). We do not condone the failure to follow that procedure. (299 F.2d, at 125.) [31]

However, since the Commission had reopened its proceedings not to reinforce its position as a litigant but rather to reverse itself and grant the plaintiff the very relief he was seeking, the court correctly held that "in the circumstances of the present case" the failure to follow the proper procedure was not prejudicial.

Every other lower federal court to consider the question has adhered to the principles stated in the cases discussed above. See *McClatchy Broadcasting Co.* v. *FCC*, 239 F.2d 19 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918; *Arrow*

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[31] The Court's citation of *Smith* v. *Pollin* is significant. That case dealt with the question of the appropriate forum, as between the district court and the court of appeals, for the filing of a motion for a new trial after an appeal had been taken. In holding that application for remand must be made, the court of appeals said: "It is clear that the District Court could not grant a motion for a new trial in a case which is pending in this court upon appeal. Jurisdiction is in this court while the appeal is pending." 194 F.2d, at 350. *Accord, Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 177; *Hovey* v. *McDonald*, 109 U.S. 150, 157 ("One general rule in all cases . . . is that an appeal suspends the power of the court below to proceed further in the cause"); *Ryan* v. *United States Lines Co.*, 303 F.2d 430, 433-34 (2d Cir. 1962); *Wolf* v. *Nazareth Enterprises, Inc.*, 303 F.2d 152, 155 (2d Cir. 1962) ("It is axiomatic that as a general rule a court has no power to reopen a final judgment once an appeal is taken as jurisdiction passes to a higher court"); *In re Federal Facilities Realty Trust*, 227 F.2d 651, 654-55 (7th Cir. 1955).

Transportation Co. v. *United States*, 176 F.Supp. 411, 415 (N.D. Ala. 1959), *aff'd*, 361 U.S. 353 ("Once jurisdiction is vested, it cannot be ousted" by subsequent orders of the ICC); *Dixie Carriers, Inc.* v. *United States*, 143 F. Supp. 844 (S.D. Texas 1956), *vacated as moot*, 355 U.S. 179; *United States* v. *Herbold Laboratory, Inc.*, 267 F. Supp. 53, 54 (C.D. Cal. 1967) ("Once [judicial] review is undertaken, neither the Commission nor any other entity has any jurisdiction to interfere in the matter"); *cf. Pan American Petroleum Corp.* v. *FPC*, 322 F.2d 999, 1004 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 941; *Public Service Comm'n* v. *FPC*, 284 F.2d 200, 206 (D.C. Cir. 1960). As is more fully set forth in the margin,[32] the decisions relied upon by appellants either support the decision of the district court (as is true of the *Atchison, T.*

We can perceive of no reason why this "axiomatic" "general rule" would not apply equally in cases of review by a district court of an agency decision as it does in cases involving review by a court of appeals of a district court decision. Apparently the District of Columbia Circuit in *Anchor Line* reached exactly that conclusion.

[32] While the Commission says that "[t]he cases upholding the Commission's continuing jurisdiction to reopen a proceeding while judicial review actions were pending are legion" (J.S. p. 14), the weakness of this precedent is betrayed by the Commission's use of a head count rather than a case identification method for citing this "legion" of authorities. Thus, the Commission says that "[f]rom 1952 through 1968, there were 65 such cases," but of these only one is named. Presumably, the balance consist of the same catalog, now updated, that the Commission provided the court in the *Atchison, T. & S.F.* litigation, as to which the court said:

> "The Government and the Commission have cited to us numerous instances wherein proceedings by the Commission were reopened following the institution of court action. However, it appears from the Government's and the Commission's annotation of them that court approval of the stay of its proceedings, pending Commission reconsideration, was obtained *prior* to the Commission's order reopening the proceedings before it." (231 F. Supp., at 427.) (Emphasis in original.)

The two decisions principally relied upon by the Commission are *Aberdeen & Rockfish R.R.* v. *United States*, 270 F. Supp. 695 (E.D. La. 1967), *aff'd*, 393 U.S. 87, and *United States* v. *Chicago, M., St. P. & P. R. Co.*,

& S.F. and *Anchor Line* cases), or are distinguishable from the case at bar.

Appellants argue that the Commission must have an opportunity to correct its own mistakes. But the rule applied by the lower court does not foreclose that opportunity. It merely assures that the court can satisfy itself that the agency will act, not as a litigant attempting to win a lawsuit by papering over deficiencies in its initial action, but rather as an impartial quasi-judicial body. It is worth noting in this connection that, if the policy urged by the Commission were compelling, presumably it would have led the Congress and this Court to a position different than has been adopted with respect to other agencies. The fact that the Commission seeks a uniquely privileged status among federal agencies suggests that the arguments it advances are less than powerful.

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294 U.S. 499. But they are not pertinent. In *Aberdeen*, the Commission upon reopening did not take additional evidence nor did it change its order in any material respect. Moreover, even if it had it would have made no difference, since the court set aside the Commission's order for other reasons. In *Chicago, M., St. P. & P. R. Co.* the issue was never considered by this Court, and again the Commission's order was set aside for other reasons.

The other decisions cited by one or both appellants are equally beside the point. In *Alamo Express, Inc.* v. *United States*, 239 F. Supp. 694 (W.D. Tex. 1965), *aff'd*, 382 U.S. 19, no court action was pending when the Commission reopened its proceedings. In *Wrather-Alvarez Broadcasting Co.* v. *FCC*, 248 F.2d 646 (D.C. Cir. 1957), the issue was simply whether the court's jurisdiction was ousted by a petition for reconsideration filed with the Commission an hour after the appeal was perfected. The court properly held that it was not. In *Frontier Airlines, Inc.* v. *CAB*, 259 F.2d 808 (D.C. Cir. 1958), the modification made by the agency in its order was not relevant to the judicial review proceedings, and thus as the court noted "no harm was done." *Id.*, at 811. In *Donaldson* v. *Read Magazine*, 333 U.S. 178, the order was not that of a quasi-judicial agency, but rather that of an executive officer. Moreover, the modification made by the officer advantaged rather than prejudiced the plaintiffs. Finally, to the extent there is language in *Evans* v. *FCC*, 113 F.2d 166 (D.C. Cir. 1940), favoring appellants' position, later decisions cited in the text make plain that this language no longer reflects the views of that court. See *Anchor Line, Ltd.* v. *FMC*, *supra*; *McClatchy Broadcasting Co.* v. *FCC*, *supra*.

The Commission also suggests that the action it took in reopening the proceedings did not prejudice the appellees. The notion seems to be that, as long as the final order of the Commission was legally unassailable except on the ground that the Commission had acted without authority in reopening the proceeding, that action should be disregarded since the final order was "correct." But if that were to be the test, the rule that the agency may not reopen without court permission would confer a right without a remedy, for an order entered in violation of the rule could be set aside only where the order was invalid for other reasons. More important, the Commission's argument disregards the interests served by the doctrine applied by the lower court. Given the limited scope of judicial review of Commission actions, the fact that the Commission on reopening may have insulated its order from judicial rejection does not mean that the Commission's action is "correct" in the sense of representing an impartial disposition of the issues. Accordingly, the real test of prejudice should be whether, had the Commission applied to the court, the court might have taken action to protect the right of the private litigants to such an impartial disposition by the Commission.

In this case, plainly such action might have been taken. The court, in the first place, might have concluded that the Commission was overly influenced by a desire to shore up its position in court, and accordingly might have denied a request to reopen. Beyond that, the court might have conditioned a grant of the request upon a variety of procedural safeguards. For example, it might have required that appellees be given an opportunity to cross-examine the DOD witnesses. Or it might have provided guidelines as to the specific details that the DOD would be required to provide in the reopened proceeding, thus giving appellees a meaningful opportunity to submit written rebuttal statements. Or it might have required the Commission to speak in its

final order to the compliance with regulations issue. To be sure, probably neither these nor any similar requirements could insure that the Commission, despite the attack upon its prior order, would act in a wholly impartial fashion upon the reopening. But it cannot be said that such steps would wholly fail of the goal, particularly since they would materially assist in sharpening the issues on judicial review. Accordingly, since the Commission's action deprived the appellees of the opportunity to secure such safeguards, that action undercut precisely those interests that the doctrine of judicial control is designed to protect. The appellees *were* prejudiced.

Finally, the Commission's suggestion (J.S. p. 15 & n. 15) that at any rate in the case at bar the Commission did not have to seek court permission to reopen because of the pendency of properly filed petitions for reconsideration is wrong on two counts. First, the petitions for reconsideration were not properly filed under the Commission's regulations for reasons that we detail in the margin.[33] Second, in any event the principle here involved does not admit of this sort of limitation. Once the agency has taken action that adversely affects private parties so that court jurisdiction is properly invoked, the court must be vested with control over the proceeding if the interests of the private parties are to be protected. If the agency wishes for some reason to retain complete authority to dispose of any pending petitions for reconsideration, it can always stay the effectiveness of its order for the brief period necessary. The Commission could have done so here. Having instead made the order effective immediately, it should not be heard to complain that the court below insisted upon its right to control the proceeding.

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[33] The petitions were improper under the Commission's temporary authority rules, which provide:

> *Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions

CONCLUSION

For the reasons stated above, the judgment of the lower court should be affirmed.

Respectfully submitted,

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for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person. (49 C.F.R. § 1131.6(a).)

Division 1's order of September 3 did not "initially" grant or deny the temporary authority but rather reversed a prior order of the Temporary Authorities Board denying the authority. Thus, under the regulations, no further petition for reconsideration was authorized.

Appellants rely upon Rule 101(g) of the Commission's General Rules, 49 C.F.R. § 1100.101(g). But under any normal canons of construction, the temporary authority rules, which are later in time and deal specifically with temporary authority proceedings, are controlling. "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . . Specific terms prevail over the general in the same or another statute, which otherwise might be controlling . . . .' " *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-29. Moreover, it is sensible to apply the special rules rather than the General Rules, for the restrictions of the former upon the filing of petitions for reconsideration are consonant with the general purpose of expediting temporary authority proceedings. Finally, it is questionable whether the Commission could have established a rule authorizing reconsideration of orders of Division 1 sitting as an appellate division even if it had sought to do so. See *Transamerican Freight Lines* v. *United States*, 258 F. Supp. 910 (D. Del. 1966), a decision the Commission evidently concedes is in point but with which it disagrees (J.S. p. 16 n. 15).

APPENDIX A

The Temporary Authority Rules

49 C.F.R. § 1131.2(c) provides:

Supporting statements. Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

APPENDIX B

Headquarters
Department of The Army
Office of The Judge Advocate General
Washington, D.C. 20310

30 April 1968

Mr. Howard McCormack
General Manager
American Farm Lines Co-op
Oklahoma City, OK 73107

Re: Application of American Farm Lines, Inc., to Transport General Commodities Including Class A and B Explosives

Dear Mr. McCormack:

As duly authorized counsel for the Secretary of the Army and the Department of Defense, I have been asked to reply to your request for the Department of Defense support in connection with your application before the Interstate Commerce Commission to transport general commodities, including Class A and B explosives.

The Department of Defense has used the services of American Farm Lines, Inc., to transport more than 1,200 shipments since December 1966. Your service has been excellent in every respect. In fact, the Department of Defense has found American Farm Lines' service to be fast, efficient, responsive, and economical. Under the circumstances, the Department of Defense is desirous of being able to continue to use the services of American Farm Lines. In many instances the Department of Defense receives direct through service from American Farm Lines, Inc. which is desirable. In other words, the Department of Defense would like to retain this transportation source which has been available to it. However, the Department of Defense is not in a position to state

that there would be insufficient or inadequate service without American Farm Lines.

Should an oral hearing be held on your application, the Department of Defense will present an authorized and qualified witness to testify to the above facts.

Sincerely yours,

CURTIS L. WAGNER, JR.
Chief, Regulatory Law Division

Mr. Wagner/svm/30 Apr 68

APPENDIX C

DEPARTMENT OF THE ARMY

Headquarters
Military Traffic Management and Terminal Service
Washington, D.C. 20315

10 May 1969

Mr. Bill D. Gardner
Riss & Company, Inc.
903 Grand Avenue
Kansas City, Missouri 64106

Dear Mr. Gardner:

This is in reply to your letter of 30 April 1968 concerning American Farm Lines proposed application to the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity.

The position of the Department of Defense (DoD) in this matter is outlined for your information. The Department of Defense has utilized the transportation services of farm cooperatives in the movement of military traffic since the latter part of 1966, and such services have been satisfactory, fast, and economical. Consequently, the DoD would like to retain this transportation source. However, the DoD is not in a position to state that there would be insufficient or inadequate service without American Farm Lines.

The American Farm Lines was advised of the above position in a letter from the Office of The Judge Advocate General, Department of the Army, dated 30 April 1968.

It is hoped that this will clarify any misunderstandings which may exist with respect to the DoD's position in this matter.

Sincerely yours,

WOODROW W. ATKINS
Colonel, JAGC
Staff Judge Advocate

(7874-1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, ET AL., *Appellees*

On Appeal From the United States District Court for the Western District of Washington

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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[illegible]

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MISCELLANEOUS:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, ET AL., *Appellees*

On Appeal From the United States District Court for the Western District of Washington

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

This appeal by American Farm Lines ("AFL") and the companion appeal by the Interstate Commerce Commission in No. 382 bring up for review by this Court a judgment of the court below nullifying orders of the Interstate Commerce Commission awarding AFL temporary common carrier authority to haul Government freight between nine mid- and southwestern states and five western states.

Four motions to affirm the judgment below have been filed on behalf of 56 appellees.[1] AFL respectfully

[1] One motion was filed on behalf of the American Trucking Associations, Inc. and 23 motor carrier appellees (hereinafter "ATA Motion"). Other motions were filed by United Transports, Inc. ("United Motion"), by a group of 27 railroad appellees ("Railroad Motion"), and by a separate group of four motor carrier appellees ("Consolidated Motion").

submits that these motions, which argue the merits of the case at great length—40 pages in one case—wholly fail to sustain the burden imposed upon the movants by Rule 16 of the Rules of this Court to show that the issues presented are insubstantial. On the contrary, these motions clearly demonstrate that the appellees are urging this Court to accept principles of law that have never been accepted by any court other than the court below, and that are in clear conflict with established law. On the basis of these highly technical and novel procedural contentions, the appellees seek immunity from even temporary competition from American Farm Lines in providing transportation service to the United States Government. Accordingly, the motions should be denied.

Significantly, the United States of America, while denominated an appellee in this Court, has not moved to affirm the judgment below. Indeed, the United States has informed the Court that it believes the decision below to be erroneous, that it does not oppose appellants' requests that probable jurisdiction be noted, and that if probable jurisdiction is noted it will support the position of the Interstate Commerce Commission. Memorandum for the United States, p. 2.[2]

It is also significant that on August 21, 1969, an order was entered in this case by Mr. Justice Douglas staying the judgment of the court below pending disposition of the Jurisdictional Statement by the entire Court.[3] As a result of this stay AFL has been permit-

[2] Unless otherwise specified, references herein to "appellees" shall mean only those appellees that have filed motions to affirm and shall exclude the United States.

[3] On July 7, 1969 the ICC's new regulations defining the scope of the agricultural cooperative exemption in the Interstate Commerce Act, 49 U.S.C. § 303(b)(5), became effective. These regulations, 49 C.F.R. § 1047.21, provide that a cooperative may not, under its ex-

ted, pending disposition of the Jurisdictional Statement, to provide the Government with the trucking service that the ICC found to be immediately and urgently needed by the Department of Defense. In staying the judgment below, Mr. Justice Douglas noted that "the jurisdictional statement filed by appellant presents substantial questions."

I. THE QUESTIONS ARE SUBSTANTIAL

Appellees have filed lengthy motions addressed to the merits of the questions raised on the appeal, and reviewing in detail the evidence submitted to the Interstate Commerce Commission.[4] One conclusion must

emption from economic regulation by the ICC, transport freight for nonmembers in excess of 15 percent of the cooperative's total annual interstate tonnage. It was in anticipation of the effectiveness of these restrictions on its ability to serve the Defense Department that AFL applied for common carrier authority and that the Department supported the application. AFL J.S., pp. 6-7, 33a.

Because AFL was prohibited by the judgment below from operating under its temporary authority at the time the new regulations took effect, and because AFL's ability to serve its own members depends so heavily on its ability to provide nonmember service, AFL and its members were threatened with very substantial injury pending this appeal. AFL Application for Stay of Judgment and Order of the District Court Pending Appeal, pp. 9-12. The Defense Department strongly supported AFL's effort to stay the lower court judgment, pointing out that even a temporary loss of AFL's service would result in higher transportation costs to the Government, a lessened capacity to make expedited deliveries of Defense materials, and an increase in the public exposure to the risks of transporting explosives. *Id.* at Ex. 7.

[4] In addition, some of the appellees have engaged in extended discussion of the injunction proceedings to which AFL is a party in the Western District of Oklahoma. These cases, which were described at page 6 of AFL's Jurisdictional Statement, deal only with the scope of the agricultural cooperative exemption *prior* to its amendment in 1968. They have absolutely no relevance to the instant case except insofar as they explain in part why AFL applied to the ICC for a common carrier certificate.

be drawn from these pleadings: the issues presented on this appeal are both substantial and important.

If the decision of the court below is permitted to stand, the result will be to cause a radical and retrogressive change in the nature of ICC temporary authority proceedings. By arguing that the ICC failed to follow its own regulations the appellees have invented an issue that simply is not present in this case. In reality they are contending that the Commission should be forced to modify its present method of processing temporary authority applications. At present the Commission determines whether the proposed service is available from existing carriers not only by considering the applicant's evidence, but also by weighing the statements of protesting carriers as to their own willingness and ability to provide the service.

The import of appellees' argument is that the Commission may not weigh the statements of the protesting carriers until it has first made an evaluation of the "sufficiency" of the evidence offered by the applicant. If the applicant has not provided every bit of information called for by the Commission's outline of the evidence to be submitted by supporting shippers, appellees argue that the application must be denied *even if the record as a whole contains evidence that would support a grant of temporary authority under the statutory standards.*

In short, by attempting to invoke the rule of the *Service* and *Accardi* cases, appellees would have this Court read the Commission's regulations as a limitation imposed by the Commission itself on the exercise of its discretionary powers under section 210a of the

Interstate Commerce Act, 49 U.S.C. § 310a.[5] No court other than the court below has ever accepted this argument. It was rejected recently by this Court in *Estes Express Lines* v. *United States*, 394 U.S. 718 (1969), *affirming per curiam*, 292 F. Supp. 842 (E.D. Va. 1968), and by district courts in *Superior Trucking Co.* v. *United States*, 1969 CCH Fed. Car. Cas. ¶ 82108 (N.D. Ga. 1969), and *Roadway Express, Inc.* v. *United States*, 263 F. Supp. 154 (N.D. Ohio 1966). In *Roadway* the district court stated (263 F. Supp. at 159) that the purpose of the temporary authority rules is simply

> to facilitate the Commission's handling of requests for temporary authority. The rules reflect no intention to reduce or relinquish its statutory discretionary power to issue certificates of temporary authority.[6]

In addition, appellees' argument has been rejected without comment in at least one other district court in which it has been raised.[7]

However, the argument continues to endure in cases in which protesting carriers are attempting to upset

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[5] Contrary to appellees' assertion, we do not contend that the ICC may not limit its own power. Consolidated Motion, p. 17. We simply contend that the Commission has never expressed any intention to limit its power to grant temporary authorities through the promulgation of the regulations in issue here.

[6] *See also Superior Trucking* v. *United States*, 1969 CCH Fed. Car. Cas. ¶ 82108, at 54544:

> There is a great deal of doubt whether the regulation in question is binding on the Commission or merely states general guidelines for the Commission's own benefit.

[7] Plaintiff's Reply Brief to ICC Motion to Cancel Further Argument, pp. 10-12, *Hussey* v. *United States*, 271 F. Supp. 650 (N.D. Cal. 1965).

ICC temporary authority orders, and it has been raised in at least two other temporary authority cases that are presently awaiting decision in district courts.[a]

Thus, the legal issue raised by this appeal is clearly of substantial importance. Unless this Court rejects the argument accepted by the court below—as have all other courts in which it has been made—it will continue to form the basis for litigation against the Commission by disappointed protestants in temporary authority cases.

In addition to the importance of the legal questions raised on this appeal for the proper administration of the temporary authority statute, there are important matters of public interest involved. The practical impact of an affirmance of the lower court's judgment would be substantially to eliminate AFL as even a temporary carrier of Government freight, thus depriving the Defense Department of an important capacity for faster, less costly, safer delivery and remitting it to the use of slower and more expensive[b] transportation services involving greater exposure of risk to the public when hazardous materials are being transported.

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[a] Brief of Plaintiffs, pp. 19-24, *Saginaw Transfer Co.* v. *United States*, Civ. No. 2964, E.D. Mich.; Brief for Plaintiffs, pp. 31-36, 46-47, *Bell Lines, Inc.* v. *United States*, Civ. No. 3759, S.D. W. Va.

[b] In the ordinary ICC certification case the cost of the proposed transportation is not a relevant issue, the theory being that the Commission has statutory rate-making powers and is obligated to insure that just and reasonable rates are charged by carriers.

While section 210a of the Interstate Commerce Act, 49 U.S.C. § 310a, does not expressly include cost as one of the determinants of need, it would be entirely reasonable for the Commission to consider cost where service to the Government is involved. Section 22 of the Interstate Commerce Act, 49 U.S.C. § 22 expressly permits free rate competition among carriers in providing service to the Government. Under section 22 carriers may tender rates to the

The vigor with which the Defense Department has supported AFL, not only in its applications for temporary and permanent authority, but in its efforts to stay the judgment of the court below pending this appeal, plainly demonstrates that the Department's need for AFL's service is far more than a casual "preference" for or "interest" in single-line service, as appellees suggest.[10] In an affidavit submitted to both this Court and the court below, Mr. Vincent F. Caputo, the Department of Defense Director for Transportation and Warehousing Policy, the Department's highest-ranking transportation official, stated in part as follows:

> The consequences of AFL's significantly shorter transit time have been enormous, both in terms of insuring the fastest possible delivery of critical war materials and in terms of effecting significant cost savings to the Government. Between December 1966 and the end of March 1969, the use of AFL has saved DOD in direct transportation costs alone $1,062,300. While figures are not available, I believe that this saving, itself substantial, is

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Government that are less than the rates set forth in tariffs that are otherwise generally applicable.

The rates submitted by AFL in its section 22 tenders have been fixed by it acting independently, and not in conjunction with other carriers acting through a conference or other rate-fixing agency. It is clear from protests to AFL's application filed with the ICC that some of the protestants saw AFL as a threat to the existing rate structure. *See, e.g.*, Protest of the Consolidated Freightways Corp. of Del., p. 3 (R. 511). (Consolidated believes AFL will pursue "rate-cutting policy if this application is granted"); Protest of Tri-State Motor Transit Co., p. 3 (R. 1187) Tri-State believes Defense Department purpose is "to create an unregulated rate war").

[10] *See* Railroad Motion, p. 8; ATA Motion, p. 8.

> vastly overshadowed by the indirect systems savings—that is, such savings as warehousing and inventory costs—that direct single-line service makes possible.
>
> * * *
>
> . . . To require a temporary cessation of AFL's service during this interim period would reduce DOD's ability to achieve expedited delivery of critical materials, would substantially increase the cost to DOD and the taxpayers of moving defense traffic, and would deny the public the additional safety benefit of reduced . . . road mileage [in the transportation] of hazardous commodities.

AFL Application For Stay of Judgment and Order of the District Court Pending Appeal, Ex. 7, pp. 3, 5.

A. The ICC Did Not Violate the Service-Accardi Rule

In its Jurisdictional Statement AFL stated that the first question raised by this appeal was whether the court below failed to apply the proper scope of judicial review in nullifying the ICC's orders for supposed non-compliance with ICC regulations, when the record contained evidence supporting the Commission's decisions. Both the ICC and the United States are in substantial agreement with this formulation of the issue. ICC J.S., p. 4; Memorandum for the United States, p. 2.

Appellees disagree with this statement of the issue however.[11] Instead, they see this appeal as raising

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[11] There appears to be no significant difference among the parties with respect to the second question stated by AFL, namely, whether the ICC had jurisdiction to reopen the administrative record to receive additional evidence after a judicial review proceeding had been commenced.

solely the question whether the ICC was required to follow its own regulations—a question they believe to be answered affirmatively by this Court's landmark decisions in *Service* v. *Dulles,* 354 U.S. 363 (1957) and *Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954), and the progeny of those cases.

The charge that an administrative agency has failed to follow its own regulations has certain superficial appeal, carrying with it the suggestion of administrative arbitrariness. But despite appellees' ingenious efforts to tug this case within the boundaries of the *Service-Accardi* rule, it is perfectly clear that that precept has no application whatsoever to the facts presented here. The primary issue remains the question of the proper scope of judicial review: Did the court below judge the agency's decision by the proper standards?

The "rules" supposedly ignored by the Commission in this case were the requirements that the statement submitted in support of AFL's application indicate whether the Defense Department had requested the proposed service from other carriers, and, if so, to identify carriers who had failed or refused to provide the service. 49 C.F.R. §§ 1131.2(c)(8) and (9). As we will show below, the whole thrust of the Defense Department statement of support was that the Department knew of no existing service that was qualitatively equal to AFL's service. We believe this was a fair and substantial response to items (8) and (9). At any rate, in order to determine whether the statement did comply with the rules it would have been necessary for the ICC to make a preliminary analysis and evaluation of AFL's evidence. The charge that the Commission failed to follow its rules, therefore, can only

mean either (1) that the Commission failed to make a preliminary determination whether the Defense Department statement provided a sufficient answer to items (8) and (9), or (2) that the Commission erroneously determined that the Department's statement did provide a sufficient answer. In either case, the appellees' argument must be rejected.

1. ***The Commission was not required to make a preliminary evaluation of AFL's evidence.*** The fallacy in appellees' contention that the ICC was required to make a preliminary evaluation of the sufficiency of AFL's evidence lies in its implicit analogy to formal judicial proceedings. The purport of the argument is that upon the submission of an applicant's supporting statements protestants may, in effect, move for a dismissal of the application for failure to make out a prima facie case.[12]

While the ICC may have discretion to establish such a procedure, it clearly did not do so in its temporary authority regulations. The regulations simply provide a two-stage process of submitting information. First, the applicant files an application accompanied by a supporting statement from the shipper. 49 C.F.R. §§ 1131.2(b) and (c). A summary of the authority sought by the application is then published in the Federal Register, and interested parties are given 15 days in which to file protests. The only information called for in the protest is a specific statement by the protest-

[12] Indeed, most of the appellees have frankly conceded that their claim relates to the sufficiency of the applicant's evidence. As stated in the ATA Motion, p. 7, "AFL failed to meet its statutory burden of proof." And as United Transports frames the issue (United Motion, p. 3), "Failure to comply with the prescribed criteria simply results in a failure to provide a basis in proof." The "failure-to-follow-rules" epithet thus serves only to obscure the true issue.

ing carrier "as to the service which such protestant can and will offer." 49 C.F.R. § 1131.3(a). No provision is made for the filing of a reply by the applicant to the protests filed against the application.

The regulations thus establish a summary procedure in which cross-examination and direct reply and rebuttal are not contemplated, and under which protests may be framed solely in reference to the Federal Register summary of the temporary authority sought. The essence of the procedure is that the Commission, in its expert judgment, weighs the gravity of the need asserted by the shipper and evaluates the capability of protesting carriers to serve that need. If errors in judgment are made by the Commission in granting temporary authority, their impact is ameliorated by the relatively short duration of the authority and by the opportunity to employ more refined fact-finding procedures in considering a corresponding application for permanent authority, such as that of AFL presently under consideration.

As appellees themselves concede, a supporting statement would be in full compliance with the Commission's rules if it stated that the shipper had made no efforts to obtain the proposed service from other carriers. Consolidated Motion, p. 26, n. 24. Such a response might be given if there were in fact no comparable service, or if the shipper was simply of the belief that there was no comparable service available. In either case the Commission would still be required to find as a matter of fact that there was no comparable service available, and if the protesting carriers were able to demonstrate that they were willing and able to provide the service, the application would undoubtedly be denied. Similarly, the fact that a shipper states that it has made unsuccessful efforts to obtain service is not dispositive of the matter. The Commission could

still find, on the basis of the protestants' evidence, that service was in fact available.

In short, haggling over the "sufficiency" of the supporting statement would serve only to make these procedures, which were designed to be summary in nature, more cumbersome.[13] Moreover, such a preliminary evaluation would bear no necessary relation to the resolution of the ultimate statutory questions that must be answered by the ICC. Indeed, as appellees themselves make clear, the procedure could easily result in the Commission's action on a temporary application being nullified notwithstanding the fact that the record was replete with evidence supporting the ICC's grant of authority, and quite irrespective of whether any party had been disadvantaged. Consolidated Motion, p. 19.[14] While appellees are understandably discom-

[13] Moreover, if a protestant is entitled to challenge the sufficiency of the supporting statement, an applicant would presumbly be entitled to challenge the "sufficiency" of a protestant's compliance with the requirement that the protest state specifically the service that the protestant can and will offer. A protest such as that filed in this case by the American Trucking Associations, Inc. would then clearly be stricken. ATA appeared as a representative of "all types of motor carriers of property", and its protest is barren of any reference to the service its members could or would offer. (R. 1517-24)

[14] The only authority cited by appellees for this somewhat startling proposition is a 1965 opinion of the Court of Claims. *Camero* v. *United States*, 345 F. 2d 798. *Camero* does not stand for such a sweeping principle, however. In that case the court found that substantial evidence existed to support an Army decision to discharge a civilian employee. The court raised the possibility, however, that the military prosecutor in the grievance proceeding leading to the discharge may have participated in the decision of the proceeding itself, to the employee's obvious prejudice and in violation of regulations requiring a separation of functions. The instant case involves no comparable challenge to the integrity of the decision-making process.

fited by use of the phrase, it is thus patent that their proposal is indeed a pointless exaltation of form over substance.

Finally, it is beyond dispute that the identical argument raised by appellees was soundly rejected in the *Estes* case, not only by the district court, but by this Court as well. *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718 (1969). The district court in *Estes* made it perfectly clear that the regulations do not require a shipper to make and catalogue meaningless requests for service it clearly believes to be unavailable or qualitatively unequal to service it is about to lose. Moreover, the court held that whether or not supporting statements expressing such a belief are sufficiently particular to comply with items (8) and (9),

> the Commission could consider the statements . . . in the light of the failure of the carriers to allege facts showing that they were providing transportation comparable in all respects to [applicant's].

292 F. Supp. at 844. On appeal to this Court it was again argued that the supporting statements had failed to comply with the regulations[15] and that argument was summarily rejected. This disposition was perfectly consistent with the established rule that if, upon a review of the entire record before the ICC, there is *any* evidence tending to show that the application proposes a service for which there is an immediate and urgent need that cannot be met by other carriers, the Commission's decision must be upheld. *Roadway Ex-*

[15] Jurisdictional Statement, p. 8, Appellants' Reply to Motions to Affirm, p. 7, *Estes Express Lines* v. *United States*, 394 U.S. 718 (1969).

press, Inc. v. *United States,* 263 F. Supp. 154 (N.D. Ohio 1966); *Bowen Transports, Inc.* v. *United States,* 116 F. Supp. 115, 120 (E.D. Ill. 1953).

2. *The Defense Department statement substantially complied with the ICC rules.* A fair reading of the Defense Department statement clearly shows that it substantially complied with the ICC's rules—and particularly with items (8) and (9), which call for information concerning efforts to obtain service from other carriers.[16]

In evaluating this statement, it is important to keep in mind that items (8) and (9) do not themselves require an applicant to *make* efforts to obtain the service from others. They simply ask whether such efforts have been made and, if so, what the results were. Thus, as appellees concede, a carrier who simply stated that it had made no such efforts because it knew of no one able to provide comparable service would be in full compliance with these regulations. Consolidated Motion, p. 26, n. 24. If such an answer were given the only issue remaining would be the ultimate question posed by section 210a of the Interstate Commerce Act, namely, whether comparable service was in fact available.

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[16] Neither of the appellants has argued, as appellees suggest they did, that the ICC may or did waive its rules in this case. Consolidated Motion, pp. 19-20. The Commission's Jurisdictional Statement merely noted that the impact of the lower court's decision—rejecting as an inadequate response to items (8) and (9) the Department's statement to the effect it knew of no service qualitatively equal to AFL's—was to require the shipper to perform the futile gesture of asking for service it could not get—a requirement the the ICC has not itself imposed. ICC J.S., p. 9.

The Department's statement shows that, based upon its extensive experience[17], it viewed AFL's service as qualitatively different from the service available from existing carriers, and that it had been relying on AFL for almost two years to fill a specialized need. Since late 1966, when the Department first began to use the highly flexible service available from farm cooperatives, it has relied upon AFL "for movement of traffic that requires expedited movement and precisely-timed delivery." Where these peculiar needs have not been present it has relied on "the more rigid service available from certificated carriers." AFL J.S., pp. 30a, 31a. In this sense the Department viewed AFL's service as a "complement" to existing service.

The statement pointed out, again in the Department's view and based upon substantial experience, that three features distinguish AFL's service and enable AFL to meet the Department's needs for expedited deliveries: First, AFL operates between the territories involved on a single-line basis, whereas most service available from other carriers requires joint-line participation by two or more carriers. AFL J.S., p. 22a. Second, virtually all other carriers are required to follow prescribed highway routings, set forth in their certificates, whereas AFL provides direct, point-to-point service. AFL J.S., p. 23a. Third, AFL uses two-man driver teams and does not change power units from origin to destination AFL J.S., pp. 23a, 31a.

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[17] The experience of the Defense Department obviously dwarfs that of all other shippers in the United States. In fiscal year 1968 (the last full year for which figures are available), the Department shipped 64 billion pounds of material at a cost of $599 million. These figures do not include contract air shipments and the movement of household effects. DOD, Military Traffic Management and Terminal Service, Quarterly Progress Report, Third Quarter FY 1969, p. 8.

The practical significance of these differences for those responsible for scheduling shipments of defense materials was clearly stated: Where joint-line, regular-route service is involved, the Department allows 24 hours transit time for each 300 miles of distance to the destination; however, where single-line, regular-route service is available, the Department computes transit times on the basis of 8 hours for each 300 miles. AFL J.S., pp. 22a-23a.

The foundation for the Department's statements concerning its experience with transit times is clearly set forth. In one 11-month period alone the Department shipped a total of 1.9 billion pounds of freight between the territories covered by the application, consisting of thousands of different commodities. AFL J.S., p. 21a. During a 19-month period that overlapped this 11-month period, the Department shipped over 74 million pounds of freight on AFL vehicles. AFL J.S., p. 31a. Thus, the Department's statements did not represent casual or frivolous conclusions; they reflected a vast experience in the transportation of goods by motor carrier.

The Department set forth a number of specific examples of instances when AFL had provided expedited deliveries that could not, to the best of the Department's knowledge and based upon its experience, have been provided by other carriers. AFL, J.S., pp. 31a-32a. In addition, it set forth in detail a tabulation of the major Defense Department origin and destination points between which there was not, to its knowledge, any carrier authorized to provide direct, single-line service. AFL J.S., pp. 25a-27a. This list identified more than 30 pairs of specific points in the territories covered by the application between which no single-line service was available. Furthermore, it iden-

tified more than a dozen additional points from which no single-line service whatsoever was available to *any* point in one or more of the territories AFL proposed to serve.

Finally, the Department made clear that it was already using AFL's service and had been using it since late 1966. AFL J.S., p. 30a-31a. Indeed, the primary reason for its support of the application was that it was faced with a substantial *loss* of AFL's service by reason of new legislation narrowing the agricultural cooperative exemption and because of the injunctions procured by competing carriers. Because AFL's service had been available to it and because AFL had satisfied the Department's requirements for expedited service during this time (AFL J.S., p. 31a), there was obviously no occasion for the Department to have called upon other carriers to perform this service.

In short, the Department's response to items (8) and (9) was as follows: The Department has a substantial need for expedited service.[18] For almost two years AFL has been meeting that need through its provision of single-line, point-to-point service. The Department is now threatened with a substantial diminution of that service. Based upon the Department's experience as a shipper of vast quantities of goods, both prior and subsequent to the advent of AFL's service, and based also upon its knowledge of the operating authorities of other carriers, it believed that no service qualitatively

[18] It should be noted that the lower court did not fault the Department's statement insofar as it was addressed to the issue of the need for the service. Accordingly, this appeal raises no question with respect to that portion of the statutory standard. The decision below was based solely upon the statement's supposed failure to provide information relating to the availability of that service from other carriers.

comparable to AFL's was available from other carriers. That such a response was sufficient to comply with items (8) and (9) is established by this Court's decision in *Estes,* and was clearly recognized by the ICC itself. In its order granting temporary authority it expressly noted that AFL "knows of no carrier in a position to meet its needs." AFL J.S., p. 36a. It would be unreasonably technical to hold that compliance with items (8) and (9) required more than this.

If the Department's conclusions were erroneous and comparable service was in fact available from other carriers, it was well within the ability of the protestants to establish this by their own evidence. However, as the Commission found, "there is nothing in the record to establish that any of the protesting carriers provide a service to meet the Defense Department's needs." AFL J.S., p. 36a. It was through no oversight or inability to respond that the carriers failed to establish their case. They failed to do so because they could not do so; they failed simply because they are not able to provide service comparable to that of AFL.

This case is markedly similar in this respect to the *Estes* case. In *Estes,* as here, the supporting shipper was already being served by the applicant at the time the application was filed. In each case, therefore, there was no occasion for the applicant to have called upon other carriers for the service. In *Estes,* as here, the shipper was faced with an imminent curtailment of service, and in each case the shipper expressed the view that no other carriers could provide service of equivalent quality and scope. In *Estes* the lower court held that the shipper's explanation of these circumstances reasonably answered items (8) and (9), and this Court affirmed summarily. The present case cannot be reasonably distinguished.

3. *Appellees suffered no prejudice.* Even if the Defense Department statement failed to provide the information called for by items (8) and (9), that failure could not conceivably prejudice appellees.

Appellees have deftly attempted to read into the ICC regulations relating to supporting shipper statements a purpose "to insure that . . . protests in rebuttal of the applicant's case can be framed with specificity." Consolidated Motion, pp. 6, 16. But the Commission itself has made it clear that no such purpose was intended. Its policy statement with respect to these regulations indicates that the regulations were designed solely to facilitate processing of temporary authority applications by the ICC staff. *See Acme Cartage Co.* v. *United States,* 290 F. Supp. 453, 457 n.4 (W.D. Wash. 1968). The Commission pointed out that prior to the adoption of the regulations many applications failed to provide adequate information and further investigation by the staff was often required. *Ibid.*

Protection for the interests of competing carriers was provided in the regulations *not* by giving them a right to frame specific rebuttals to applicant's evidence, but by providing them an opportunity to state with specificity what service they themselves can and will provide. 49 C.F.R. § 1131.3(a) (2). As noted above, the regulations contemplate that the protest may be framed solely in response to the Federal Register summary of the operating authority sought by the applicant. When protests are filed setting forth the service the protestant is willing and able to provide, in conformity with the regulations, the Commission is in a position to make a judgment whether the proposed service is in fact available from existing carriers.

Further protection for protestants is provided in the opportunity for judicial review under the settled

standards applied by reviewing courts in temporary authority cases. As one district court pointed out very recently, in rejecting the identical arguments made by appellees in the instant case,

> There can be no prejudice to the plaintiffs from the Commission's alleged failure to follow subsections (8) and (9), since there is some evidence in the record to support the Commission's decision.

Superior Trucking v. *United States,* 1969 CCH Fed. Car. Cas. ¶ 82108, at 54545 (N.D. Ga. 1969).

Appellees' plaintive argument that they were denied an opportunity to frame specific rebuttals to applicants' evidence is therefore meaningless. They were given precisely the opportunity the Commission's regulations contemplated that they should have—the opportunity to state what portion of the service for which AFL sought authority they were willing and able to furnish. Moreover, they took full advantage of this opportunity; as appellees admit, they "adduced a considerable body of evidence," and their evidence, taken with AFL's evidence, "presented questions of fact." Consolidated Motion, pp. 9, 25. The record before the ICC was 3,500 pages in length. (R. 506-4003). Appellees simply failed to make a showing on that record that convinced the Commission that they could provide the service. The only prejudice they suffered resulted from the inadequacy of the evidence they adduced.[19]

Finally, appellees claims of prejudice resulting from alleged technical procedural deficiencies must be

[19] In the permanent application proceeding, which is now pending, appellees have had and will have ample opportunity not only to submit their own evidence, but also to cross-examine and rebut AFL's evidence. Indeed, in June 1969, at the opening session of oral hearing on AFL's permanent application, AFL's witnesses were cross-examined by the protesting carriers continuously over a six-day period.

weighed against the fact that in this case they are seeking to be relieved from even temporary competition. This is not a case like *Service* or *Accardi* or *Vitarelli*, where individuals were deprived of their livelihood in accusatory proceedings. It is a case involving broad economic issues and questions of national transportation policy, in which a national trade association and a group of large commercial corporations are engaging in a concerted effort to prevent the entry of a new competitor, even temporarily. Against this background, claims of minor procedural irregularities in a proceeding resulting in only a temporary licensing of the feared competition ring hollow indeed.

B. The Filing of the Complaint in This Case Did Not Oust the Commission's Jurisdiction

The underlying flaw in appellees' arguments with respect to the propriety of the reopening of the administrative record lies in their contention that the agency proceeding had been ended at the time the complaint was filed and interlocutory relief was sought in the court below. The substance of their position is that because the ICC had completed its consideration of the matter, it acted "inconsistently" with the district court's jurisdiction in proceeding after the court entered its stay of the Commission's order.

In fact, under the circumstances of this case there was absolutely no such inconsistency, as many of the appellees themselves recognized. At the time the complaint was filed the ICC had not completed its proceedings because the appellees themselves had asked the Commission to reconsider its decision. It had refused, however, to stay the effectiveness of AFL's temporary authority. Thus, while the Commission's order was not yet ripe for judicial review on the merits, because of the pending petitions, it may reasonably be concluded that appellees had exhausted their administrative rem-

edies insofar as interlocutory relief was concerned, and that an immediate effort to obtain such relief in court, pending final action by the ICC, was appropriate.

A brief review of the facts is necessary in order to place appellees' jurisdictional argument in proper perspective:

The ICC's first order granting temporary authority to AFL was entered on September 3, 1968, and served on September 5, 1968. AFL J.S., p. 15a. Beginning as early as September 12, 1968, a number of the protesting carriers filed petitions for reconsideration of the Commission's September 3 order.[20] In addition, a number of protestants asked that the effective date of AFL's temporary authority be postponed pending final action by the Commission on the petitions.[21] However, between September 12 and 19 the Commission entered orders denying these requests to stay the effectiveness of the temporary authority (R. 1732-35), and it became effective on September 16, 1968. (R. 57)

Appellees were thus faced with an obvious dilemma. While many of them had sought to have the ICC overturn its own order of September 3, the Commission had not yet acted upon their petitions. Yet AFL's temporary authority had become effective, and AFL was

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[20] Most of the original plaintiffs in this case filed such petitions:

Carrier	*Date Petition for Reconsideration Filed*
Black Ball Freight Service	September 13 (R. 2499)
Consolidated Freightways Corp.	September 15 (R. 2513)
D.C. International, Inc.	September 20 (R. 2621)
Garrett Freightlines, Inc.	September 23 (R. 2637)
Navajo Freight Lines, Inc.	September 15 (R. 2529)
Pacific Intermountain Express Co.	September 20 (R. 2626)
Riss & Co.	September 24 (R. 3521)
Western Gillette, Inc.	September 19 (R. 2588)

[21] R. 2478, 2480, 2487, 2513, 2553.

free to commence operations. Appellees elected to resolve their dilemma by filing suit against the Commission and simultaneously seeking interlocutory relief against the continued effectiveness of the order. Accordingly, on September 26, 1968 a complaint and a motion for a stay of the Commission order were filed in the court below. (R. 1, 11).

On October 2, 1968 the court below granted a stay of the effectiveness of the ICC order (R. 82), and on October 9, in response to the stay, the Commission entered an order postponing the effectiveness of its own order of September 3. Although the ICC, in opposing the stay, had expressly called to the court's attention the fact that some 60 petitions for reconsideration were still pending before it (R. 57),[22] it is significant that the court did not in any way forbid the ICC from continuing to consider these petitions. Indeed, on October 6, 1968, following entry of the court's order, three additional carriers petitioned the ICC for reconsideration of its September 3 order.[23]

Replies to the petitions for reconsideration were filed both by AFL and the Defense Department. On November 5, 1968 the ICC issued an order expressly acknowledging both the entry of the district court's stay order and the filing of appellees' petitions for reconsideration. AFL J.S., p. 40a. It noted, moreover, that the Department's reply had raised additional arguments in support of the application, and that the appellees had not yet had an opportunity to reply to these contentions. Accordingly, it ordered that the record be reopened in order to permit the submission of sworn evidence on these issues. The Commission's

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[22] The Commission's brief in opposition to the stay clearly informed the court that the Commission's Rules of Practice, 49 C.F.R. § 1100.101(g) permitted the filing of such petitions. (R. 57)

[23] R. 3587, 3595.

order expressly noted that in view of the district court's stay order, the effectiveness of AFL's temporary authority continued in suspension. AFL J. S., p. 41a.

It is obvious, therefore, that the ICC did not act in disregard of the lower court's order. There was, moreover, absolutely no inconsistency between the preliminary exercise of jurisdiction by the court below and the continued consideration of the pending petitions by the Commission. In practical effect, the only way appellees could have secured interim relief from the injury they were alleging was by invoking the court's jurisdiction prior to completion of the agency proceeding. Such a procedure has long been sanctioned by this Court. See *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290 (1923).

Indeed, the appropriateness of continued consideration by the Commission was recognized by the appellees themselves. Their petitions for reconsideration on the merits were filed *after* the ICC had refused to stay its order, and only a few days before they filed their lawsuit. Had they truly believed that the Commission was disabled from proceeding, it would have been a simple matter for them to request the district court not only to stay the effectiveness of AFL's authority, but to stay further proceedings pending judicial review. They did not do so, however. Instead, many of them continued to participate in the ICC proceedings without a murmur of objection.[24] On November 1, 1968,

[24] Some appellees admittedly argued to the Commission that it was without jurisdiction. On October 30, 1968, for example, such contentions were advanced on behalf of Black Ball, Consolidated and Garrett. (R. 3638). However, none of these parties made any effort in the lower court to prevent the Commission from continuing the proceeding.

It is noteworthy that appellees did not even bother to file the record of the ICC proceeding with the court until January 24, 1969 —well after the ICC had acted to reopen that record and had rendered its decision based upon the reopened record.

for example, appellee Tri-State Motor Transit Co., argued that if the Commission decided to reopen the record it should only do so after setting the matter for oral hearing. (R. 3671) Similarly, in response to the petitions of AFL and the Defense Department filed in mid-October, seeking a reopening of the record, the American Trucking Associations, Inc. filed a lengthy opposition devoid of any suggestion that the ICC lacked power to proceed further. Indeed, ATA's pleading renewed its earlier motion to strike certain evidence from the record (R. 3705), thus clearly indicating its acceptance of the Commission's jurisdiction.

Appellees now attempt to extricate themselves from their obviously awkward position by arguing that their own petitions for reconsideration were unauthorized and erroneously filed,[25] and therefore the ICC decision of September 3, 1968 was fully ripe for review when the complaint below was filed. Such a contention—which apparently occurred to appellees only after AFL had replied to the appellees' petitions for reconsideration and had itself asked the ICC to reopen the record (see, *e.g.*, R. 3639)— might warrant considera-

[25] Appellees' argument is strained indeed. While apparently conceding that Rule 101(g) of the Commission's General Rules of Practice on its face permits petitions for reconsideration, they contend that the General Rules were superseded by the Commission's later-adopted rules relating to temporary authorities. Consolidated Motion, p. 39, n. 33. There are two difficulties with this position: First, the ICC itself has stated that Rule 101(g) permitted the filing of these petitions. (R. 57) It cannot seriously be argued, therefore, that the Commission intended to supersede this rule. Second, the temporary authority rules themselves expressly provide for the filing of petitions for reconsideration "pursuant to and in accordance with the Commission's General and Special Rules of Practice." 49 C.F.R. § 1131.6(a). Thus, far from superseding Rule 101(g) of the General Rules when it adopted the temporary authority rules, the Commission expressly incorporated it.

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The undesirable results of an affirmance of the lower court's decision are manifold: It would encumber the ICC's consideration of temporary authority applications with procedures that are not only inconsistent with the summary nature of such cases, but wholly unnecessary for the protection of the rights of protesting carriers; it would provide—and has provided—additional bases for attacking Commission orders in court, thus encouraging litigation in an area where Congress intended the agency to have wide discretion; it would deprive the Department of Defense of a service that is faster, safer, and less expensive than that which the Department has been using since December of 1966, and that was found by the ICC to be immediately and urgently needed.

The substantiality and importance of the issues is thus evident. As AFL suggested in its Jurisdictional Statement, summary disposition of this case would only be appropriate if that disposition were a reversal of the court below. The lower court's decision was clearly erroneous, as is recognized by appellee United States in its Memorandum and as is conclusively shown by this Court's summary disposition in the *Estes* case. It is amply clear, moreover, that the Defense Department statement substantially complied with the ICC's rules, and that this statement, taken together with appellees' own protests, provided a sound basis for the Commission's statutory findings that AFL should be granted authority to provide an immediately needed service that is unavailable from other carriers.

Appellees' motions have argued the merits of the appeal in detail, and AFL respectfully urges the Court to reverse the judgment below on the pleadings now before

the Court and to direct the entry of judgment for appellants.[26]

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September 1969

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[26] Appellees have conceded that if this Court accepts jurisdiction it may appropriately consider the question whether there was evidence in the record to support the Commission's decision on the merits. Consolidation Motion, p. 3 n.2. The parties thus are in agreement that there is no need to remand for further proceedings in the event the Court reverses the court below. AFL submits that the Commission's decision can properly be sustained solely on the basis of the Defense Department statement. It should be noted, moreover, that AFL's evidence also included a 210-page analysis of the operating authorities of the leading protestants. (R. 1761-1970) This analysis showed in detail how cumbersome and inefficient the existing pattern of interconnecting carriers actually is. On these grounds AFL urges summary reversal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant,*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees.*

No. 382

INTERSTATE COMMERCE COMMISSION, *Appellant,*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees.*

On Appeal From the United States District Court For the Western District of Washington

BRIEF OF APPELLANT AMERICAN FARM LINES

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IN THE

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OCTOBER TERM, 1969

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On Appeal From the United States District Court for the Western District of Washington

---

BRIEF OF APPELLANT AMERICAN FARM LINES

OPINION BELOW

These are consolidated appeals from a judgment of the United States District Court for the Western District of Washington, entered March 26, 1969. The Opinion, Findings of Fact and Conclusions of law of the district court are reported as 298 F. Supp. 1006.

The district court's judgment nullified orders of the Interstate Commerce Commission entered September 3, 1968 and December 19, 1968. These orders each granted appellant American Farm Lines ("AFL")

temporary autho a motor common carrier to haul general commod r the United States Government between nine md southwestern states and five western states. Ters of the ICC (which appear at (A. 143a and A. are not reported.

RISDICTION

The judgmen he district court was entered March 26, 1969. filed a Notice of Appeal in the court below on 3, 1969 (R. 4017), and filed its Jurisdictional ent in this Court on July 22, 1969. Probable j tion was noted October 27, 1969. The jurisdictionis Court rests upon 28 U.S.C. § 1253 and 2101(

STATUTE EGULATIONS INVOLVED

Section 210a(he Interstate Commerce Act, 52 Stat. 1238, as ad, 49 U.S.C. § 310a(a), provides in relevant part ows:

> (a) To enal provision of service for which there is an iate and urgent need to a point or points om a territory having no carrier service capf meeting such need, the Commission may discretion and without hearings or other prags, grant temporary authority for such ser a common carrier . . . by motor vehicle . . .

Relevant portf the regulations of the Interstate Commercemission dealing with the filing and processing plications for temporary motor carrier authorit C.F.R. § 1131.2 and 1131.3) and with petitions fosideration of orders of appellate divisions of the ission on review of decisions of Commission boa9 C.F.R. § 1100.101(g)) are set forth in Appendereto.

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the district court erred in nullifying temporary authority orders of the Interstate Commerce Commission on the ground that the Defense Department statement supporting the application did not literally comply with procedural rules of the ICC, when the statement substantially provided the information called for by those rules?

2. Whether the record as a whole before the Interstate Commerce Commission contained evidence to support the Commission's grant of temporary authority to American Farm Lines?

3. Whether the court below erred in holding that the Interstate Commerce Commission lacked jurisdiction to reopen the record in a pending temporary authority application proceeding at a time when petitions for reconsideration were properly before the Commission and the court's jurisdiction had been invoked for the limited purpose of securing interlocutory relief?

STATEMENT OF THE CASE

American Farm Lines is both a federation of agricultural marketing cooperatives and an agricultural cooperative. AFL was formed in 1964 to provide motor transportation services to its members. Its sixteen member cooperatives engage in the processing and marketing of the products grown by their own members.[1]

As a cooperative and federation of cooperatives AFL was not at the time of its formation, and is not now,

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[1] The principal facilities of AFL's members are located in Washington, Oregon, Northern California, Utah, Nebraska, Missouri, Texas, New Mexico, Wisconsin, Maryland, Illinois and Massachusetts.

required by law to possess a certificate of public convenience and necessity from the Interstate Commerce Commission in order to transport freight for its members. Prior to its amendment in 1968, section 203(b)(5) of the Interstate Commerce Act, ch. 722, 54 Stat. 921 exempted from such certification:

> motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined. . . .[2]

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[2] Section 15(a) of the Agricultural Marketing Act of 1929, 12 U.S.C. § 1141j, defined the term "cooperative association" as follows:

> As used in this subchapter, the term "cooperative association" means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services. *Provided, however,* That such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> Third. That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

In 1965 this exemption was construed to authorize an agricultural cooperative, engaged in motor transportation, to carry freight for shippers who are not members of the cooperative, to the extent that such nonmember transportation is "incidental and necessary" to the cooperative's primary transportation activities. *Northwest Agricultural Cooperative Ass'n* v. *Interstate Commerce Commission*, 350 F.2d 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). In December 1966, under the authority of that exemption, AFL began to haul freight for the Department of Defense to meet urgent defense needs.[3]

During 1967, AFL's ability to carry nonmember freight was threatened in two respects:

(1) Legislation designed to limit substantially the scope of the exemption provided to cooperatives under section 203(b)(5), was introduced in Congress with the support of the American Trucking Associations, Inc.,

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[3] It was at this time that the Secretary of Defense adopted a policy of using farm cooperative transportation "because of our responsibility to obtain effective transportation of military supplies at the lowest overall cost to the Government and the taxpayer", and to encourage competition in the provision of transportation services to the Department. *Hearings on Agricultural Cooperative Transportation Exemption Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 90th Cong., 1st Sess. 155 (1967) (testimony of Defense Department witness). This action was required by Department of Defense Directive No. 4500.9, par. IV(C)(1) (September 27, 1968) which instructs all components of the Department to select that means of transportation "which will meet DOD requirements satisfactorily at the lowest overall cost from the origin to the final known destination." The directive also indicates that consideration must be given to the economies available through reductions in indirect costs which may be obtained from expedited service of the sort performed by AFL.

and AFL's principal competitors for Government business.[4]

(2) A group of common carriers of munitions, who competed with AFL for Government business and whose rates were generally higher than those charged by AFL,[5] filed suit against AFL in the United States District Court for the Western District of Oklahoma under section 222(b)(2) of the Interstate Commerce Act, 49 U.S.C. § 322(b)(2) (Supp. IV 1965-1968). They were attempting to impose severe limitations on AFL's ability to carry freight—particularly explosives—for the United States Government. *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* Civ. No. 67-487, (W.D. Okla.). On February 20, 1968, an injunction was entered in this case prohibiting AFL from performing "back-to-back" movements—that is, two consecutive movements—for the United States Government.[6]

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[4] S. 752, 90th Cong., 1st Sess. (1967). As originally introduced, S. 752 would have made the exemption available "only when the nonmember transportation involved farm products, farm supplies, or other farm-related traffic." In the form in which it was enacted, the legislation imposed a quantitative limitation on the volume of nonmember freight a cooperative could carry within the scope of the exemption. See p. 13, *infra.*

[5] An affidavit filed in the court below showed that between December 1966 and March 1969 AFL's lower rates saved the Government over $1,000,000 in direct transportation costs. (A.402a)

[6] On May 28, 1968 the same district court, in a companion case, *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* Civ. No. 68-148, (W.D. Okla.), enjoined AFL from carrying nonmember freight except when proceeding to pick up or when returning from delivery of a member shipment, and then only when necessary to prevent proceeding with an empty vehicle.

Because of the injunctive restrictions imposed upon it, and in anticipation of the restrictive legislation enacted later in 1968, AFL filed applications with the ICC for temporary and permanent authority to carry freight for the United States Government as a regulated common carrier between nine mid- and southwestern states and five western states.[7] The Department of Defense vigorously supported both of these applications because of its urgent need for precisely the kind of service AFL had demonstrated it could provide.[8]

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[7] The applications sought authority to operate between all points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma and Kansas, on the one hand, and all points in Washington, California, Nevada, Utah and Arizona, on the other.

[8] The American Trucking Associations attempted to bring pressure on the Department to withdraw its support of AFL's application by going directly to the Secretary of Defense. In a reply from the Secretary's Assistant for Installations & Logistics to the President of the ATA (A. 139a), the Department reiterated its support for AFL, stating:

> This has reference to your recent letter to the Secretary of Defense asking that Department of Defense support of the application of American Farm Lines, Inc., for temporary Interstate Commerce Commission operating authority be withdrawn.
>
> Your request is, among other things, based on the view that action in supporting the above mentioned application is a complete reversal of existing Department of Defense policy. I wish to asssure you that such is not the case.
>
> It has been the policy of this Department, in fact we are required, to obtain the commercial transportation services we need at the lowest sound cost with due consideration being given to service factors. Also a basic objective of long standing is the reduction of costs associated with the distribution of military supplies and equipment to the maximum feasible

Pursuant to ICC regulations, 49 C.F.R. § 1131.2(c), the Defense Department, as the primary shipper to be served by AFL, urged the ICC to grant the application. (A. 14a) The Department's letter stated that "in order to improve logistics effectiveness and to reduce costs the Department is constantly looking for ways to

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extent. Thus, we obviously have had a continuing interest in the shortening of the logistics pipeline with its attendant reduction in inventory levels.

Our indicated support of American Farm Lines' application for temporary authority is wholly consistent with our policy and with the objective stated above. Consequently, to withdraw this support would not be in keeping with the obligations this Department has to operate efficiently and economically and to improve its logistics operations wherever possible.

American Farm Lines has provided a service for the movement of our traffic which has been excellent in every respect and has also resulted in significantly reduced rates. We desire that the type and quality of service which American Farm Lines has provided to the Department be continued. In fact, we would like to see it expanded wherever it may be feasible to do so.

The policies referred to in the letter are further amplified in Department of Defense Instruction Number 4500.17 (January 16, 1969) which provides, in part, as follows:

B. *Operating Authority or Carrier Serivce.* Participation by DoD in transportation regulatory body proceedings involving the inauguration, expansion, or reduction of operating authority or carrier service will be undertaken only when:

1. The Department of Defense is named as a party to the proceedings by a transportation regulatory body, or

2. A transportation regulatory body requests information from DoD on matters pending before it, or

3. The Single Manager concerned (Directives 5160.2, 5160.10 and 5160.53 references (c), (d), and (e)) determines that

'shorten the pipeline' of its vital military supplies" through the reduction of transit times between points of manufacture and points of export. In more than 1200 shipments carried for the Department by AFL under its exemption, the letter stated, AFL had not only provided excellent service in "shortening the pipeline," but had afforded the Department "a meaningful measure, under practical conditions, of carrier capability in general." However, because of the injunctive restrictions that had been imposed upon AFL's operations AFL had been required to turn down more than 700 truckloads of Defense traffic. Accordingly, "an immediate grant of temporary authority is necessary," the Department stated, "to assure the continued availability of [AFL's] service."

Some 125 motor and rail carriers filed protests to AFL's application. Nevertheless, on September 3, 1968, Division 1 of the ICC granted AFL's application for temporary authority. (A. 143a) Between September 12 and October 6, 1968, some 60 petitions for reconsidera-

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any one of the following situations exist within their area of responsibility as outlined in V, below:

a. There is no commercial carrier authorized to render the service required by the Department of Defense.

b. *The services of authorized commercial carriers are inadequate to fulfill the needs of the Department of Defense.*

c. *Appreciably greater economy, frequency or speed of service to the Department of Defense will result.*

d. The discontinuance or abandonment of an operating authority or carrier service would be detrimental to the DoD or the proposed inauguration or expansion of an operating authority or service would be beneficial to the DoD. (Emphasis added)

tion of the Commission's order were filed by protesting carriers. In addition, a number of protestants asked that the effective date of AFL's temporary authority be postponed pending final action by the Commission on the petitions for reconsideration. (R. 2478, 2480, 2487, 2513, 2553.) The Commission denied the requests for postponement. (A. 146a-48a) AFL's temporary authority became effective on September 16, 1968. (R. 57)

On September 26, 1968, following the ICC's refusal to postpone the effective date of AFL's temporary authority, but prior to any decision by the Commission on the pending petitions for reconsideration, a number of protesting carriers, including many who had filed such petitions, filed suit in the court below. They asked the district court to stay the effectiveness of the ICC's order of September 3. The complaint sought to have the ICC's order annulled and set aside on the ground that the statement from the Department of Defense submitted in support of AFL's application failed to comply with ICC regulations prescribing the form of supporting shipper statements. On October 2 the court granted the stay (A. 166a). On October 9 the Commission responded to the stay by entering an order postponing the effectiveness of its September order. (A. 169a)

On October 16 and 18 respectively, the Defense Department and AFL filed replies to the petitions for reconsideration. (R. 3600, 3606). On November 5, 1968, the ICC issued an order noting that the Department's reply had raised additional reasons for granting AFL's application to which the protesting carriers had not had an opportunity to reply. Accordingly, it directed that the record be reopened to permit the submission of

sworn evidence on these issues. The order further provided that in view of the district court's stay order, AFL's temporary authority would remain in suspension. (A. 170a)

In accordance with the order reopening the ICC proceedings, the Defense Department, on November 20, 1968, filed the sworn statement of Mr. Vincent F. Caputo, its Director for Transportation and Warehousing Policy, the highest ranking transportation official in the Department. (A. 194a) The protesting carriers filed reply statements. On December 19, 1968 the ICC entered an order again granting AFL's application. (A. 367a). The Commission made the following findings of fact as to the transportation needs of the Department of Defense:

> (1) That, in discharging its responsibility for the conduct of the Nation's defense, it imperatively requires service over the most direct routes in a minimum transit time to effect movement of a vast quantity of numerous commodities between innumerable points and places within the United States and abroad;
>
> (2) That it has experienced inefficient and circuitous joint-line transportation by the use of existing carrier services which have been deficient for its needs, particularly relating to the coordination of the arrival of inbound shipments with the production schedules of manufacturing installations and the departure times and transshipment dates of matters and materials necessary to the national defense;
>
> (3) That it has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs;

(4) That there is nothing in this record to establish that any of the protesting carriers provide a service to meet its needs;

(5) That unless applicant is granted the temporary authority sought herein, the Department of Defense will be without an expedited and flexible service for which it has an immediate and urgent need necessary to the defense of the country; and

(6) That, in balacing the scales of public interest, it is necessary to assure that the Government's immediate and urgent transportation requirement be met by an expedited and flexible service which will be used to complement rather than replace existing services.

On December 31, 1968, a supplemental complaint was filed in the court below, alleging in substance that the new Defense Department statement still failed to comply with the Commission's regulations. (A. 371a) On January 6, 1969 the court below entered an order staying the effectiveness of the Commission's December 19 order. (A. 382a) The case was subsequently briefed and argued on the merits and on March 26, 1969 the lower court entered its judgment holding the ICC temporary authority orders of September 3 and December 19, 1968 null and void. (A. 400a)

The court held that the Defense Department statement of May 15, 1968 did not comply with the ICC regulations because it failed to provide the two categories of information called for by subsections (8) and (9) of 49 C.F.R. § 1131.2(c), namely:

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers

> who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

In the court's view an explicit response precisely in the terms of subsections (8) and (9) was absolutely mandatory. The court further held that notwithstanding the pendency of petitions for reconsideration before the ICC—which it found to be unauthorized under ICC rules—the ICC lost jurisdiction to reopen the record once the judicial review proceeding was filed. But even if the Commission had such jurisdiction, the court held, the new statement submitted on behalf of the Defense Department in November failed to provide the information called for by subsections (8) and (9). Accordingly, the court nullified both the September 3 and December 19 orders of the ICC. (A. 400a)

In May 1969 the ICC announced the adoption of regulations, to become effective July 7, 1969, implementing a restrictive amendment to the agricultural cooperative exemption in section 203(b)(5) of the Interstate Commerce Act.* Under the new restrictions cooperatives were not to be permitted to haul more than 15 per cent of their total annual interstate tonnage for nonmembers. After the district court refused to stay its judgment nullifying AFL's temporary authority (R. 4231), AFL applied to this Court for a stay of the lower court's judgment pending this appeal. In support of its application AFL pointed out

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*On July 26, 1968, S. 752 had been enacted into law. 82 Stat. 448. That legislation was not intended to become effective, however, until the ICC had adopted implementing regulations, and in the interim the existing law relating to the agricultural cooperative exemption was to remain in effect. S. Rep. No. 1152, 90th Cong., 2d Sess. 16 (1968).

that because AFL was faced with the necessity of drastically curtailing its nonmember activities, this curtailment, which would not have been necessary but for the action of the district court in this case, threatened AFL with operating losses of hundreds of thousands of dollars and with the destruction of an organization that had taken five years of hard work to build.

In supporting AFL's stay application, the Department of Defense pointed out that as a result of AFL's lower rates, the Department had saved $1,062,300 in direct transportation costs between December 1966 and March 1969. In addition, it had saved a vastly larger amount in such indirect costs as warehousing and inventory, by using AFL's service. (A. 402a) [10] The Department stated that even a temporary cessation of AFL's service to it "would reduce DOD's ability to achieve expedited delivery of critical materials, would substantially increase the cost to DOD and the taxpayers of moving defense traffic, and would deny the public the additional safety benefit of reduced on-the-road mileage of hazardous commodities." (A. 404a)

On August 21, 1969, Mr. Justice Douglas granted AFL's stay application. (A. 422a) On August 27, 1969 the Chairman of the ICC entered an order reinstating AFL's temporary authority. AFL thereupon resumed common carrier service to the Government pursuant to its temporary authority.

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[10] The Department was required under its own policy to consider such factors in deciding whether to support AFL's application. See note 7 *supra*, at p. 7.

SUMMARY OF ARGUMENT

I.

The district court erred in holding that the Department of Defense statement in support of AFL's application for temporary authority failed to comply with the ICC's rules. Those rules called upon the Department to state whether it had requested other carriers to provide the service proposed by AFL, and, if it had, to describe the results of those requests. The Department's statement made clear that it knew of no other carriers who were authorized to provide direct, single-line service, and were thus able to meet the Department's needs for rapid deliveries of Defense materials throughout the territories that AFL proposed to serve. The Department had been without such service until December 1966 when AFL entered the field, and it was supporting AFL's application because it was threatened with a loss of that service. The statement thus substantially provided the information called for by the ICC rules. *Estes Express Lines* v. *United States,* 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam,* 394 U.S. 718 (1969).

II.

Even if the Defense Department's statement were deemed not to have provided the information called for by the ICC's rules, such a failure could not in and of itself be the basis for nullifying the ICC's decision to grant temporary authority to AFL. The ICC was entitled to consider other evidence offered by AFL, as well as the evidence submitted by appellees, in determining whether carriers other than AFL were authorized to provide service comparable to that of AFL. Under well settled rules of judicial

review of ICC temporary authority orders, the district court should have evaluated the ICC's action on the basis of the entire record made before the Commission, and not merely on a portion of the evidence submitted in support of AFL. If there was any evidence in the record to sustain the Commission, its action could not properly be set aside.

III.

Appellees could not conceivably have been prejudiced by the alleged failure of the ICC to enforce compliance with its temporary authority rules. The issue before the ICC was whether there were existing carriers authorized to perform direct, single-line service between points in the territories covered by AFL's application. The Department's support for AFL was not premised upon specific service failures by appellees, but upon appellees' general lack of operating authority sufficient to enable them to provide high-speed service. Appellees' only burden under the ICC rules was to state specifically whether they were willing and able to provide such service, and appellees were in a position to comply with these rules notwithstanding the Department's alleged failure to provide all the information required of it.

IV.

The record before the ICC overwhelmingly established both the Government's need for the high-speed lower cost service offered by AFL and the unavailability of such service from other carriers. The Defense Department's need was established by the fact that it had been using AFL's service since 1966 to meet its requirements for expedited deliveries, and that it is now faced with a possible loss of that service. Evidence before the ICC showed that single-line service

such as AFL's is available on less than 5 percent of the routings offered by existing common carriers serving the territories covered by AFL's application.

V.

The district court erred in holding that the ICC lacked jurisdiction to reopen the administrative record once appellees had filed a complaint and moved for a stay in the court below. At the time the complaint was filed more than sixty petitions for reconsideration were pending before the ICC. These petitions were expressly authorized by the ICC's rules. The Commission's action was thus not administratively final and ripe for judicial review until the petitions had been acted upon. However, because the ICC had refused to stay the effectiveness of AFL's temporary authority pending action on the petitions for reconsideration, appellees were entitled to invoke the jurisdiction of the district court for the limited purpose of granting such a stay. The ICC's continued consideration of the case following the filing of the complaint in the lower court was thus in no way inconsistent with the district court's jurisdiction ultimately to review the case on the merits.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE STATEMENT SUPPORTING AFL'S TEMPORARY AUTHORITY APPLICATION FAILED TO COMPLY WITH THE ICC'S RULES

Under Section 210a(a) of the Interstate Commerce Act the ICC has broad discretion to grant an application for temporary motor carrier authority, without hearing or other prescribed procedures, when two conditions are found to exist:

1. There must be an immediate and urgent need for the service, and

2. The territory within which the service is proposed must have no carrier service capable of meeting such need.

In its order granting temporary authority to AFL the ICC made express findings that these statutory criteria had been satisfied by AFL's application. The ICC concluded that:

1. Unless the application were granted "the Department of Defense will be without an expedited and flexible service for which it has an immediate and urgent need necessary to the defense of the country," and

2. There was nothing in the record to establish that any of the protesting carriers could provide a service that met the Defense Department needs. (A. 368a)

The district court did not dispute the ICC's finding that the Defense Department had an immediate and urgent need for AFL's service. Nor did the court consider whether the record before the ICC contained evidence supporting the Commission's finding that none of the protesting carriers could meet this need. The court simply limited judicial review to a strict parsing of the sworn statement submitted by the Defense Department in support of AFL's application. The District Court concluded that the statement had failed to say whether the Department had made efforts to obtain the service from other carriers and to describe the results of those efforts, if any were made. The court held that a "statement of these matters is mandatorily required" by the ICC's temporary authority rule, 49 C.F.R. § 1131.2(c) (8) and (9), and that in the absence of "full compliance" with these "mandatory" rules the ICC could not lawfully grant temporary authority to AFL.

As we shall demonstrate below, the Defense Department's statement substantially provided the information called for by the ICC's rules. Even if it had failed to do so, however, the Commission was not required automatically to reject the application without considering the merits and without evaluating the evidence in the record as a whole. The Commission was entitled to weigh the evidence of need offered by the Defense Department, to examine the Department's contention that it knew of no service comparable to AFL's and, by taking into account the evidence offered by the protesting carriers, to determine whether in fact comparable service was available from them. On the basis of the evidence in support of AFL, as well as protestants' evidence, the Commission properly found that the service for which the Department had shown an immediate and urgent need was simply not available from carriers other than AFL.

The lower court's conclusion that the ICC rules are "mandatory", and that the Commission cannot weigh and evaluate the evidence unless there is strict compliance with these rules, is flatly at variance with the decisions of other courts, including this Court. More important, it has the effect of imposing needless and wholly unwarranted procedural encumbrances on the temporary licensing process — a process that the controlling statute expressly contemplates will be summary in nature to accommodate the national interest in an efficient and modern transportation system that can meet a variety of urgent needs.

A. The Defense Department Statement Substantially Complied With the ICC's Rules

A fair reading of the Defense Department's statement in support of AFL's application clearly shows that it substantially compiled with the ICC's temporary authority rules—and particularly with subparagraphs (8) and (9) of 49 C.F.R. § 1131.2(c), which call for information concerning the Department's efforts to obtain service from other carriers.

In evaluating this statement, it is important to keep in mind that neither subparagraphs (8) and (9), nor anything else in the Interstate Commerce Act or the ICC's regulations, require a shipper supporting such an application to *make* efforts to obtain the proposed service from others. The regulations simply call for a disclosure whether such efforts have been made. If they have been made the shipper is asked to describe the results of its efforts. As appellees themselves concede, a supporting shipper who simply stated that it had made no efforts to obtain the proposed service from other carriers would be in full compliance with the ICC's rules prescribing the content of supporting shipper statements.[11]

The Defense Department's statement concededly did not state *in haec verba* that the Department had made

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[11] Motion to Affirm of Consolidated Freightways Corp. of Delaware et al. p. 26, n. 24. Of course, even full compliance with these regulations does not necessarily mean that the application must be granted. The ICC would still have to resolve the ultimate questions posed by section 210a of the Interstate Commerce Act, namely, (1) whether the shipper has an immediate and urgent need, and (2) whether comparable service is in fact available from other carriers. Appellees' contention is that failure to comply with the regulations requires automatic denial of the application even if the record as a whole would support a grant of the application under these standards.

no efforts to obtain the proposed service from other carriers. The entire thrust of the statement, however, was that the Department of Defense, the nation's most experienced shipper,[12] *knew* of no carrier or carriers whose operating authorities allowed them to provide the type of high-speed service available from AFL throughout the territory covered by the application.[13] The statement pointed out that prior to AFL's entry into the field the Department had had to live without such service. (A. 206a) Moreover, the statement made clear that since it entered the field AFL had met the Department's need for this type of service in excellent fashion. Accordingly, AFL submits that the statement substantially provided the information called for by subsections (8) and (9). The Department's statement showed that, based upon its extensive experience as a shipper, it viewed AFL's service as being qualitatively different from the service available from existing carriers, and that since late 1966 it had been relying on AFL to fill an urgent specialized need for rapid deliveries.

This qualitative superiority of AFL's service was possible, in the Department's view, because AFL provided direct, single-line movements. By contrast, most

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[12] The experience of the Defense Department obviously dwarfs that of all other shippers in the United States. In fiscal year 1968 (the last full year for which figures are available), the Department shipped 64 billion pounds of material at a cost of $599 million. These figures do not include contract air shipments and the movement of household effects. DOD, Military Traffic Management and Terminal Service, Quarterly Progress Report, Third Quarter FY 1969, p. 8.

[13] The ICC expressly found, in granting AFL's application, that the Defense Department's statement established that the Department knew of no carrier in a position to meet its needs. (A. 368a)

service available from other carriers required joint-line participation by two or more carriers over prescribed and often circuitous highway routings. The practical measure of this qualitative difference was clearly stated: Where joint-line, regular-route service is involved, such as provided by the protestants, the Department allowed 24 hours transit time for each 300 miles of distance to the destination; however, where single-line irregular-route service was available, such as that provided by AFL, the Department computed transit times on the basis of 8 hours for each 300 miles. *In other words, the Department viewed AFL's services as three times faster than that available from other carriers.*

The Department set forth a number of specific instances when AFL had provided expedited delivery that could not, to the best of its knowledge, have been provided by other carriers. (A. 207a-208a) In addition, it tabulated the major Defense installations between which there was not, to its knowledge, any carrier authorized to provide direct, single-line service. Finally, the Department made clear that AFL had been meeting its needs for expedited delivery since 1966 and that it was supporting the application because the Government was faced with a loss of AFL's service.

In short, the Department's response to the requirements of subparagraphs (8) and (9) was that it had not requested the proposed service from other carriers because AFL had been meeting its needs for such service and because it believed, on the basis of its experience as a shipper of vast quantities of goods, and on its knowledge of the operating authorities of other

carriers, that no service qualitatively comparable to AFL's was available from other carriers.[14]

That such a response was sufficient to comply with the requirements of subsections (8) and (9) is clearly established by this Court's decision in *Estes Express Lines* v. *United States*, 394 U.S. 718 (1969), *affirming per curiam*, 292 F. Supp. 842 (E.D. Va. 1968). In *Estes*, as in this case, the shipper supporting the application for temporary authority was already being served by the applicant, and was faced with imminent curtailment of that service. In each case the shipper expressed the view that no other carrier could provide service of equivalent quality and scope. In *Estes*, the district court held that the shipper's explanation of these circumstances reasonably complied with subsections (8) and (9), and this Court affirmed summarily. The present case cannot be distinguished from *Estes* in this regard, and it would be unreasonably technical to hold that compliance with subsections (8) and (9) required more than what was provided in the Department's statement.

B. The Court Below Erred In Holding The ICC's Rules To Be "Mandatory"

Even if the Defense Department's support statement were read narrowly as failing to provide the information called for by subsections (8) and (9) of 49 C.F.R. § 1131.2(c), such failure cannot itself be the basis for nullifying the Commission's decision granting the ap-

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[14] If the Department's conclusions were erroneous, and comparable service was in fact available from other carriers, it was well within the ability of the protesting carriers to establish this by their own evidence. The district court did not reach this question, however, because it erroneously held that the Department had failed to state whether it had requested the service from other carriers.

plication on the merits. A holding that these rules are "mandatory" simply invites technical and purposeless precedural haggling among the parties and diverts attention from the only meaningful issue in cases such as this, namely, whether the record as a whole contains evidence to support the ICC's decisions.[18]

The ICC's rules relating to temporary authority applications, which were adopted to 1965, set forth in detail the procedures for the processing of such applications. Section 1131.2(c) of these rules provides that each application must be accompanied by a supporting statement from the shipper requiring the proposed service. It further outlines 11 categories of information to be covered by the supporting statement. When an application is filed, a summary of the authority sought is then published in the Federal Register, and interested parties are given 15 days in which to file protests. The only information called for in the protest is a specific statement by the protesting carrier "as to the service which such protestant can and will offer". 49 C.F.R. § 1131.3(a) (2). No provision is made for the filing of a reply by the applicant to such protests.

The rules thus carry out the aim of the statute in establishing a summary procedure. Cross-examination, direct reply and rebuttal are not contemplated; protests may be framed solely in reference to the published summary description of the operating authority sought by

[18] It is noteworthy that the district court that decided this case is the only court in the country that has accepted the argument that these rules are "mandatory." Its decision in this case was based upon its earlier decision in *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968). Following the decision in *Acme* the argument gained great currency among disappointed carriers who were attacking ICC temporary authority orders, but, as pointed out *infra*, the district courts have repeatedly rejected it.

the applicant. Section 210a of the Interstate Commerce Act contemplates that the ICC, as the agency primarily responsible for administering national transportation policy, will weigh the gravity of the need asserted by the shipper and evaluate the capability of protesting carriers to serve that need. If errors of fact or judgment are made by the Commission in granting temporary authority, their impact is ameliorated by the relatively short duration of the authority and by the opportunity to employ more refined fact-finding procedures in considering an application for corresponding permanent authority.[16]

In a policy statement issued in January 1968, the ICC made clear that the intent of its temporary authority rules is to facilitate its processing of the more than 5,000 applications for temporary authority it receives annually. 2 CCH Fed. Carr. Rep. ¶ 23114. The Commission stated that because of inadequate preparation of many applications, it frequently "has found it difficult to reach an informed and equitable decision." In many cases, it pointed out, further investigation by the ICC staff has been required. Accordingly, the Commission announced that it would deny applications that did not "adequately comply" with its rules where "because of non-compliance . . . , a fair adjudication is not possible on the record before the Commission". *Ibid.*

Thus, the evident purpose of the rules was to ease the Commission's burden of processing applications that do not provide sufficient information for the Commission to exercise its discretion. Neither the Commission nor any reviewing court other than the court below has

[16] AFL's application for permanent authority identical in scope to the temporary authority granted in this case is presently pending before an ICC hearing examiner.

ever suggested that the temporary authority rules—particularly that portion of the rules prescribing the content of supporting shipper statements—were intended for the benefit of protesting carriers. Indeed, it would be flatly inconsistent with the purpose of the rules—to expedite the processing of temporary authority applications—to interpret them in a way to encourage argumentation over fine points of procedure. The instant case demonstrates the mischievous results of such interpretation.

All other courts, including this Court, that have been presented with the contention that these rules are "mandatory" have rejected the argument. It was implicitly rejected when this Court summarily affirmed the district court in *Estes Express Lines* v. *United States,* 394 U.S. 718 (1969),[17] and was explicitly rejected in *Bell Lines, Inc.* v. *United States,* 1 CCH F. Carr. Rep. [1969 F. Carr. Cas.] ¶ 82139, at 54661 (S. D. W. Va. 1969), *appeal docketed,* No. 893, 1969 Term, Nov. 28, 1969, where the court stated that

> The eleven rules of the Commission relating to the contents of letter statements supporting applications for temporary authority are not legal absolutely but administrative guidelines.

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[17] The first question presented for review by the appellants in *Estes* was "Whether the Interstate Commerce Commission is bound by its own regulations governing the issuance of temporary authority franchises to motor carriers under Section 210a(a) of the Interstate Commerce Act." Juridictional Statement, pp. 2-3, *Estes Express Lines* v. *United States,* 394 U.S. 718 (1969).

It was also rejected in *Superior Trucking Co.* v. *United States,* 302 F. Supp. 257, 263-64 (N.D. Ga. 1969);[18] *Roadway Express, Inc.* v. *United States,* 263 F. Supp. 154 (N.D. Ohio 1966); and *Hussey* v. *United States,* 271 F. Supp. 650 (N.D. Cal. 1965).[19]

In the present case the considerations that underlay the Commission's rules were clearly not present. Quite obviously the Commission believed that there was adequate information before it to permit an adjudication of the issues presented. No further investigation was necessary by the staff, and the Commission had no difficulty making the findings required by the statute. Because the temporary authority rules were adopted by the Commission to ease its own burden in processing applications, there is no useful purpose in argument addressed to technical compliance with the rules. The only relevant question for the reviewing court is whether there was evidence to support the conclusion reached by the Commission.

Appellees have attempted to direct attention away from the substantive merits of the case by alleging that the ICC's failure to enforce its regulations against AFL violated the rule established in cases involving personal civil liberties, such as *Service* v. *Dulles,* 354

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[18] In *Superior* the court stated (302 F. Supp. at 263)

> The regulations were designed to facilitate the Commission's findings of an urgent and unmet need; if facts supporting these findings exist in the record, the fact that the regulations were not strictly followed should be irrelevant. It is particularly inappropriate to strictly bind an agency to regulations made under a statute designed to encourage summary procedures.

[19] In *Hussey* the argument was raised in Plaintiff's Reply Brief to ICC Motion to Cancel Further Argument, pp. 10-12, and was rejected without comment by the court.

U.S. 363 (1957) and *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). The essence of their argument is that the ICC was obligated to make a preliminary evaluation of the statement supporting the AFL's application, and if that statement did not provide every bit of the information called for by the temporary authority rules, to deny the application automatically—*even if the record as a whole contained evidence that would support a grant of temporary authority under the statutory standards.*

To accept appellees' argument would be to cause a retrogressive change in the nature of ICC temporary authority proceedings, and would serve no purpose other than to provide entrenched carriers with additional opportunities to raise procedural obstacles to the entry of new competitors. Moreover, under its present practice the ICC determines whether a proposed temporary service is available from existing carriers by considering the evidence submitted in support of the application and by weighing the statement of protesting carriers as to their own willingness and ability to provide the service. If such statements disclose that the protestants are not capable of providing service comparable to that proposed by the applicant, the application may be granted.

This procedure was expressly sanctioned in the *Estes* case, where this Court summarily rejected the very contentions advanced in this case. In *Estes* the district court held that whether or not the supporting shipper had given a sufficient response to subsections (8) and (9), the Commission could, in applying the statutory criteria, base its decision on "the failure of the carriers to allege facts showing that they were providing transportation comparable in all respects" to that proposed

by the applicant. *Estes Express Lines* v. *United States*, 292 F. Supp. 842, 844 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718 (1969). In affirming the district courts's decision, this Court made clear that ICC temporary authority orders should be reviewed on the entire record before the Commission, and should not be subjected to the kind of hypertechnical piecemeal scrutiny suggested by appellees.

C. Appellees Could Not Have Been Prejudiced by the ICC's Alleged Failure to Enforce Its Own Rules

Even if it is assumed that the Defense Department statement supporting AFL's application was "deficient" because it failed to state whether the Department had requested the proposed service from other carriers, the appellees could not conceivably have been prejudiced by that "deficiency."

Appellees appear willing to concede that "a showing of prejudice is essential" when the *Service-Accardi* rule is invoked as grounds for overturning agency action.[20] However, their claim of prejudice resulting from the ICC's alleged failure to enforce subsections (8) and (9) of the temporary authority rules is clearly insufficient to warrant nullification of the Commission's decision.

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[20] Motion to Affirm of Consolidated Freightways Corp. of Delaware et al., p. 28. Appellees state that "the one court squarely presented with the issue" whether a showing of prejudice is essential declined to pass on it. However, a recent decision by the United States Court of Appeals for the District of Columbia Circuit has squarely decided the issue. In *National Capital Airlines, Inc.* v. *CAB* F.2d No. 22,634, September 12, 1969) the court rejected an attack on a CAB order, where the attack was based on claims of violations by the Board of its own procedural rules, on the sole ground that the petitioner had not been prejudiced by any of the alleged violations.

Appellees claim that because the Defense Department did not state whether it had requested the proposed service from other carriers and did not detail any service failures, appellees were unable to frame protests to the application with specificity. Had the Department given a detailed catalogue of service failures, appellees argue, the protestants might have been able to submit evidence directly disputing the Department's allegations.

There are two difficulties with appellees' argument: First, in requiring supporting shippers to describe their efforts, if any, to procure the proposed service from other carriers, the ICC evidenced no intent whatsoever to benefit protesting carriers or to enable them to frame specific rebuttals. As indicated above, the Commission adopted these rules as guidelines for the presentation of evidence to ease the Commission's own burdens in processing temporary authority applications. The rules do not call upon protesting carriers to explain away alleged deficiencies or otherwise to produce evidence disputing the supporting shipper's statement. The rules call upon such carriers to do only one thing: to state with specificity "the service which such protestant can and will offer," 49 C.F.R. § 1131.3(a)(2), a statement that may be framed solely in response to the Federal Register summary of the operating authority sought by the applicant.

Second, in the present case, the Defense Department's support of AFL's application was not premised upon specific service failures by other carriers. It was premised upon the more general and rather obvious proposition that direct single-line service is faster and safer (a particularly important consideration where many tons of explosives are being transported) than

circuitous multiple line service.[21] As the Department pointed out, "service offered by currently authorized motor carriers for the movement of DOD traffic between points in the involved territories is not generally available upon a single line irregular route basis." (A. 199a) Evidence submitted by AFL showed that single-line service was available in less than 5 percent of the routings of existing major carriers between Government installations in the territory covered by the application. See p. 38, *infra*.

The real issue, therefore, was whether direct single-line service was available to the Government to any meaningful extent. If protesting carriers were able to offer such service, their burden under the Commission's rules was to state that fact with specificity. The evidentiary issue was thus clearly and broadly drawn, and the alleged failure of the Defense Department to detail specific efforts to obtain direct single-line service from existing carriers could not conceivably have prejudiced the protestants' ability to discharge the burden imposed upon them by the rules.

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[21] The obviousness of this proposition is evidenced by the fact that because of the Defense Department's successful support of AFL's application "regulated motor carriers with restricted authority are now able to seek improved operating rights and more than 125 have done so." Motion to Affirm of American Trucking Associations, Inc., et al., p. 6, n. 18. The Department's support for these applications has been based upon the same considerations as in this case.

II. THE RECORD BEFORE THE ICC CONTAINED AMPLE EVIDENCE TO SUPPORT THE COMMISSION'S GRANT OF AUTHORITY TO AFL

It is the well-established rule that a decision of the ICC granting temporary operating authority under section 210a(a) of the Interstate Commerce Act must be sustained if there is

> Any evidence in the administrative record which tends to show that the temporary authority provides a service "for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such a need. . . ."

Roadway Express, Inc. v. *United States,* 263 F. Supp. 154, 157 (N.D. Ohio 1966). See also *Hussey* v. *United States,* 271 F. Supp. 650 (N.D. Cal. 1965); *Merchants Delivery Co.* v. *United States,* 265 F. Supp. 669 (W.D. Mo. 1967); *Union Cartage Co.* v. *United States,* 244 F. Supp. 1005 (D. Mass. 1965).[22] AFL submits that the voluminous record in this case contained more than

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[22] The rule is clearly established that the "substantial evidence" test need not be met on review of ICC temporary authority orders. See *Bell Lines, Inc.* v. *United States,* 1969 CCH Fed. Carr. Cas. ¶ 82139 (S.D. W.Va. 1969); *Superior Trucking Co.* v. *United States,* 302 F. Supp. 257, 261 (N.D. Ga. 1969); *Merchants Delivery Co.* v. *United States, supra.* In *Superior Trucking, supra,* 302 F. Supp. at 257, the district court stated that

> "in order to uphold the Commission's decision, we need find only some evidence in the record, so the Commission cannot be said to have acted arbitrarily and capriciously or to have abused its discretion."

ample evidence to support the ICC's grant of temporary authority to AFL.[23]

The direct evidence in support of AFL's application consisted of (1) a two page letter of support originally submitted by the Department of Defense (A. 14a), (2) a 22-page sworn statement submitted by the Department of Defense after the proceeding was reopened (A. 194a), and (3) a 210-page series of exhibits submitted by AFL comparing AFL's proposed service between some 275 Government installations in the territory covered by the application with the service available from the leading protestant carriers. (R. 1761-1970). This evidence showed as follows with respect to the statutory criteria:

Need for the service: Between August 1, 1967, and June 30, 1968, the Defense Department required service in the territory covered by AFL's application for more

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[23] In view of its decision on this procedural issue, the district court did not reach the substantive question whether the record contained evidence to support the Commission's decision. The parties are in agreement that it is appropriate for this Court to consider the question at this time. See Motion to Affirm of Consolidated Freightways Corp. of Delaware, et al., p. 3 n. 2. Accordingly, in the event the Court finds that the lower court was in error in nullifying the ICC decision for supposed procedural defects, there is no need to remand the case for further proceedings in the district court. This Court is as able as the district court to resolve the remaining substantive issue on the basis of the record made before the ICC. Indeed, AFL believes the Defense Department's supporting statement in and of itself is sufficient basis for upholding the ICC decision on the merits. In any event, in view of the fact that this case ivolves a transportation service immediately and urgently needed by Government and that well over a year has elapsed since the ICC first authorized this service, appellant respectfully submits that the case should be disposed of on the merits without further delay. *See SEC* v. *National Securities, Inc.*, 393 U.S. 453, 464-65 (1969).

than 1.9 billion pounds of freight. Some 50 items of freight were listed as representative of the thousands of articles and commodities shipped (A. 197a), and 70 typical origin and destination points were identified. (A. 196-7a) A substantial portion of the freight shipped by the Department must move on an expedited basis to air bases and ports for transshipment overseas. In addition, it is necessary in many instances for the Department to make precisely timed deliveries of materials at manufacturing installations. Such deliveries must be coordinated with production schedules. For example, empty shell cases delivered to the Louisiana Army Ammunition Department and the Pine Bluff Arsenal in Arkansas are fed directly into the production line from the delivery vehicle. (A. 204a).

In addition to its specific need for expedited delivery to meet production and export schedules, the Department has a general obligation to conduct its operations in the most efficient and economical means possible.[24] It is constantly looking for means of shortening the supply "pipeline" by reducing the time it takes to ship goods from manufacturing points to points of export. Longer transit times simply result in higher costs to the taxpayer. (A. 14a, 204a)

In 1966 a number of agricultural cooperatives solicited traffic from the Defense Department for movement under their exemption from economic regulation. (A. 206a) In December 1966, the Department began to use AFL to meet its needs for high-speed precisely timed deliveries (A. 206a), and between December 1966, and

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[24] *See, e.g.*, National Security Act of 1947, as amended, 72 Stat. 514, 50 U.S.C. § 401 (1964) ("to provide more effective, efficient and economical administration in the Department of Defense").

June 30, 1968, AFL transported more than 74 million pounds of freight for the Department. (A. 207a) AFL fully met the Department's need for expedited delivery and its service was considered by the Department to be "excellent in every respect." (A. 12a) In addition, AFL's service was considered to be particularly important as a yardstick against which to measure the capabilities of other carriers.

The immediacy and urgency of the Department's need for AFL's service derived from the fact that the Department was faced with a substantial curtailment of the service it had been receiving from AFL for almost two years.[25] The Department pointed out in its May 15, 1968, letter of support that by reason of the injunctions entered against AFL by the district court in Oklahoma, AFL had already been forced to turn down over 700 truckloads of Defense traffic, whereas prior to the injunction it had carried approximately 300 truckloads per month for the Department. (A. 15a) In the verified supporting statement filed in November, 1968, the Department additionally pointed out that by reason of the July 1968, amendment to section 203 (b) (5) of the Interstate Commerce Act, severely limiting the nonmember traffic that agricultural cooperatives could handle, AFL's ability to serve the Department in the future would be even more drastically reduced. The Department noted that it was supporting AFL's application for permanent authority, and it urged the Commission to grant AFL's application for temporary

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[25] See 49 C.F.R. § 1131.4(b)(2) (immediate and urgent need may be shown by "a discontinuance of existing service"); *Superior Trucking Co.* v. *United States*, 302 F. Supp. 257, 261-62 (N.D. Ga. 1969).

authority to prevent any interruption in this valuable service. (A. 208-09a)

Finally, the ICC could have taken note of the obvious fact that direct single-line transportation of hazardous materials, such as explosives, reduces the exposure of the public to the risks involved in moving such commodities. Indeed, as the Department pointed out to the court below (A. 402a-403a) at the very time AFL's application was before the ICC, the State of California, supported by the Department of Transportation, had petitioned the ICC to adopt rules *requiring* carriers of hazardous materials to travel by the "nearest, direct route."

Unavailabilty of qualitatively equal service from other carriers: It is amply clear from the Department's supporting statements that its need related to the *type* of service available to it—specifically to the speed and timing of such service. No claim was made that the Department was unable to move freight between any points in the territory covered by the application. Thus, the factual issue before the ICC was whether carriers other than AFL were able to provide the Government with service that was as fast as AFL's.

The Defense Department's statement pointed out that there were three factors that distinguished AFL's operations from those of other carriers and that disabled the other carriers from providing service as fast as that of AFL:

First, the majority of all certificated service available to the Department is provided on a joint-line basis—that is, two or more carriers are required to complete a shipment from origin to destination. (A. 198a)

Second, virtually all certificated carriers are required to follow regular routes set forth in their certificates. Thus, even where single-line service is available the carriers routes are often circuitous, adding hours to transit times. (A. 199a)

Third, some carriers follow the practice of switching drivers and power units at relay points along their routes, thus causing shipment delays. (A. 199a)

By contrast, AFL provides service on a single-line, direct-route basis, using two-man driver teams, and has, in the Department's view, thus been able to provide service superior to that available from other carriers. (A. 206a)

The practical significances of these differences from the viewpoint of the Defense Department can be summarized as follows: Where joint-line, irregular route service is involved, the Department allows 24 hours transit time for each 300 miles of distance to the destination. However, where single-line, regular route service such as AFL's is available, the Department can plan on transit times that are three times as fast, namely, eight hours for each 300 miles. (A. 198-99a)

As illustrative of the superiority of AFL's service, the Department described in detail five instances in which its specific requirements for expedited delivery were met by AFL, where, based upon the Department's experience, joint-line service could not have satisfied its requirements. In addition, the Department set forth in detail a tabulation of the major Government installations in the territorities covered by AFL's application between which there was no carrier authorized to provide direct, single-line service. This list identified more than 30 pairs of specific points between which no single-

line service was available, and more than a dozen additional points from which no single-line service was available to any point in one or more of the territories AFL proposed to serve.

Finally, AFL itself submitted a minutely detailed comparison of the service available between more than 275 military origin and destination points from AFL, on one hand, and, on the other, the seven leading common carriers hauling munitions for the Government.[26] (R. 1761) These exhibits showed the various routings that were available to the Department from the common carriers and generally compared the mileages involved in these routings with those available from AFL. In addition, the exhibits showed the number of joint-line carriers participating in each routing.

Of a total of approximately 2,030 routings available from carriers other than AFL only 93—or approximately four percent—were available on a single-line basis.[27] By contrast, direct single-line service was available from AFL between every origin and destination point shown on the exhibits.

AFL submits that this direct evidence in support of the application overwhelmingly demonstrated that the Government had an immediate and urgent need for AFL's service that could not be met by existing carriers.

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[26] These seven carriers are Consolidated Copperstate Lines, Navajo Freight Lines, Inc., Ringsby Truck Lines, Inc., T.I.M.E. Freight, Inc., Tri-State Motor Transit Co., Western Gillette, Inc., and Riss & Co., Inc.

[27] Four hundred and fifty routings required joint-line service from two carriers; 960 required service from three carriers; 424 required service from four carriers; and 99 required service from five connecting carriers.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE ICC LACKED JURISDICTION TO REOPEN THE ADMINISTRATIVE RECORD.

As an alternative ground for nullifying the ICC's grant of temporary authority to AFL, the district court held that the Commission lacked jurisdiction to reopen the administrative record once a complaint had been filed seeking judicial review. This holding was clearly erroneous.

The administrative proceeding had not been completed when the complaint below was filed because there were some 60 petitions for reconsideration pending before the ICC. Indeed, when the complaint was filed it was the clear recognition of the parties that the agency proceeding had not been terminated. The jurisdiction of the district court was properly invoked at that time, under recognized procedures, solely to obtain interlocutory relief pending final action by the Commission, and the Commission's decision was not ripe for plenary review on the merits until the petitions for reconsideration had been acted upon.

A careful examination of the chronology of events in September 1968 provides an expose of the frivolous nature of appellees' argument.

The Commission's first decision granting temporary authority to AFL was entered on September 3, 1968 and served on the parties on September 5. (A. 143a). Beginning as early as September 12, 1968, more than 60 of the protesting carriers filed petitions for reconsideration of that order. Because the Commission's order was effective almost immediately, however, a number of these carriers asked the Commission to stay the effective date of AFL's temporary authority until it

could pass upon the pending petitions. Between September 11 and 16 the ICC denied the requests for a stay. (A. 146-48a) AFL's authority became effective on September 16. (R. 57.)

Appellees were thus faced with an obvious dilemma: The ICC had not yet acted on their petitions for reconsideration, yet AFL was free to commence operations under its temporary authority. Appellees sought to resolve their problem in a manner long sanctioned by this Court—that is, by filing suit against the Commission *prior* to completion of the agency proceeding and by simultaneously moving for a stay of the ICC's order. Their complaint and motion were filed in the district court on September 26, 1968. At this time the period for filing petitions for reconsideration of the September 3 order had not yet expired and neither AFL nor the Defense Department had had an opportunity to reply to the petitions that had already been filed.[28] On October 2, 1968 the court below entered an order staying the effectiveness of AFL's temporary authority. (A. 166a.)

It is amply clear that on September 26, when the complaint was filed and a stay of the ICC order was sought, the appellees were nevertheless fully prepared to continue with the pending proceeding before the ICC. Moreover, at that time neither the appellees nor the court below perceived any inconsistency or conflict between the preliminary exercise of judicial juris-

[28] Under the ICC's General Rules of Practice, petitions for reconsideration of the ICC's order of September 3, 1968 would have been in time if filed by October 7, 1968. 49 C.F.R. §§ 1100.21(a), 1100.101(e), AFL and the Defense Department had until October 27, 1968 to file replies to such petitions. 49 C.F.R. § 1100.23(b).

diction and the continued consideration by the ICC of the petitions for reconsideration pending before it. This common understanding is evidenced by the following facts:

1. Eight of the ten original plaintiffs in this action had petitions for reconsideration pending when they moved the district court to stay the ICC's order. All of these petitions were filed *after* the ICC refused to stay the effectiveness of the September 3 order, and several were filed within three days prior to the filing of the complaint in this action. (R. 2499, 2513, 2529, 2588, 2621, 2626, 2637, 3521.) These parties thus clearly disclosed an intention to continue litigating before the ICC while concurrently seeking anticipatory relief in court.

2. While appellees asked the district court to stay the effectiveness of the ICC's order of September 3, they did not ask the court to stay further proceedings before the Commission, again showing their willingness to continue with the ICC proceeding. (A. 149a).

3. Although the ICC, in opposing appellees' stay motion, expressly called the district court's attention to the fact that some 60 petitions for reconsideration were then pending before the ICC (R. 57), the court's stay order did not in any way forbid the ICC from considering and acting on these petitions or from otherwise continuing with the case before it. (A. 166-67a)

4. On October 6, 1968, four days *after* the court below entered its stay order, three more of the appellees petitioned the ICC for consideration of its September 3 order. (R. 3587, 3595.)

5. Replies to the pending petitions for reconsideration were filed by AFL and the Defense Department

on October 16 and 18, 1968 (R. 3600, 3606). None of the appellees suggested that such replies were inappropriate because the court had obtained exclusive jurisdiction.

6. In its reply to the petitions for reconsideration, AFL asked the ICC to reopen the record to receive additional evidence (R. 3615), and none of the appellees attempted to invoke the court's jurisdiction to prevent such reopening. The American Trucking Associations, Inc. filed a lengthy opposition to these requests to reopen, but their opposition was significantly devoid of any suggestion that the ICC lacked jurisdiction to proceed further. Indeed, ATA renewed an earlier motion to strike certain evidence from the record, thus clearly indicating its acceptance of the ICC's jurisdiction. (R. 3705) Similarly, appellee Tri-State Motor Transit Co. urged, without suggesting any jurisdictional infirmity, that if the Commission decided to reopen the record, it should set the matter for oral hearing. (R. 3671)

7. Most significantly, appellees did not file the record of the ICC proceedings with the court below until January 24, 1969 (A. 6a), more than a month after the ICC had reopened the record and had issued a new order granting temporary authority to AFL.[29]

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[29] There is additional evidence of the lack of substance in appellees' argument that the ICC lost jurisdiction when the complaint was filed. On September 9, 1969, after Mr. Justice Douglas entered an order staying the lower court's decision and permitting AFL's temporary authority to take effect, the Munitions Carriers Conference, Inc., a unit of the American Trucking Associations that had itself appeared as a protestant, moved the ICC to reopen the record and to reconsider and deny AFL's application notwithstanding the fact the case was pending in this Court. Apparently the Conference had forgotten that its parent body, ATA, had successfully persuaded the district court, and was arguing in this Court, that the ICC lacked jurisdiction to reopen.

The facts outlined above illustrate the awkward situation in which appellees find themselves today. They are now attempting to extricate themselves by arguing that their own petitions for reconsideration were unauthorized by the ICC rules, and that the ICC order of September 3, 1968 was therefore fully ripe for judicial review when the complaint was filed. Notwithstanding the astonishing candor of the industry's leading trade association and some of the country's foremost truckers in belatedly confessing ignorance of the ICC's rules, their contention is simply wrong. Rule 101(g) of the ICC's General Rules of Practice, 49' C.F.R. § 1100.101(g) expressly provides[30] that when an appellate division of the Commission reverses the decision of a Commission board, a petition for reconsideration may be filed by any party adversely affected by the appellate division decision. That rule precisely covers the situation presented in this case: AFL's application had originally been denied by the ICC's Temporary Authorities Board. (A. 141a.) On review of that decision, Division 1 of the Commission, acting as an appellate division, reversed the Board on September 3, 1968. (A. 143a) Appellees were thus entirely correct in their original judgment that they were entitled to file petitions for reconsideration of the September 3, order.[31]

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[30] Rule 101(g) is set forth in full in Appendix A hereto.

[31] Appellees have suggested that Rule 101(g) of the General Rules of Practice was implicitly superseded by the ICC's later-adopted rules relating to temporary authorities. There are two difficulties with this position: First, the ICC itself has stated that Rule 101(g) permitted the filing of these petitions. (R. 57). It can not seriously be argued, therefore, that the Commission intended to supersede this rule. As this Court has pointed out, great deference should be given to an administrative agency's interpretation

It has been clearly established since this Court's decision in *Oklahoma Natural Gas Co.* v. *Russell,* 261 U.S. 290 (1923) that the jurisdiction of a district court may be invoked for the purpose of obtaining interlocutory relief from an order of an administrative agency prior to completion of the administrative proceeding. Indeed, *Oklahoma Natural Gas* presented a situation remarkably similar to the instant case. In that case two natural gas companies had applied to a state regulatory agency for permission to increase their rates, and the agency had denied the requests. An appeal was taken to the state Supreme Court, which had power, acting in a legislative capacity, to fix natural gas rates and, pending action by it, to permit the proposed rates to take effect under a supersedeas. The Oklahoma court denied a supersedeas, however. Before the court had decided the case on the merits, the companies filed suit in a federal court asking for preliminary and permanent injunctions against the allegedly confiscatory rates they were being forced to charge. The Supreme Court held that notwithstanding the pendency of the state proceeding it was appropriate for the district court to grant a preliminary injunction allowing the higher rates to take effect until the state proceeding had ended and the federal court could review the merits.

A similar result was obtained in cases involving the Interstate Commerce Commission. In *Pacific Inland*

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of its own regulations. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). Second, the temporary authority rules themselves expressly provide for the filing of petitions for reconsideration "pursuant to and in accordance with the Commission's General and Special Rules of Practice." 49 C.F.R. § 1131.6(a). Thus, far from superseding Rule 101(g) of the General Rules when it adopted the temporary authority rules, the Commission expressly incorporated it.

Tariff Bureau v. *United States,* 129 F. Supp. 472 (D. Ore. 1955) and *Cantlay & Tanzola, Inc.* v. *United States,* 115 F. Supp. 72 (S.D. Cal. 1953) the courts expressly sanctioned the very procedure followed by appellees here. In both cases the parties were unable to procure interlocutory relief from the ICC during the pendency of petitions for reconsideration before the Commission; in each case a complaint was filed against the ICC and a temporary restraining order was entered pending final action by the ICC and review on the merits by the court.[32]

While this Court need not decide the question, AFL contends that petitions for reconsideration were *required* to be filed by appellees before the ICC's order of September 3, 1968 was ripe for judicial review on the merits.[33] But even if such a petition for reconsidera-

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[32] It is noteworthy that in both the *Pacific Inland Tariff* case and *Cantlay & Tanzola* case, the jurisdiction of the district court to grant interlocutory relief was challenged on the ground that because petitions for reconsideration were pending the plaintiffs had not exhausted their administrative remedies. In both cases this argument was rejected. The court in *Cantlay & Tanzola* stated (115 F. Supp. at 76) that

> the danger of immediate and irreparable injury to plaintiffs, had they awaited action of the Commission on their petition for reconsideration, was sufficiently clear to warrant judicial intervention in advance of final administrative action, by way of exception to the "long-settled rule of judicial administration . . . that no one is entitled to judicial relief for a . . . threatened injury until the prescribed administrative remedy has been exhausted."

[33] Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9) expressly provides that a decision of the Commission or an appellate division of the Commission may be subjected to judicial review after a petition for reconsideration has been denied "but not otherwise." *Cf. Southland Indus.* v. *FCC,* 99 F.2d 117 (D.C. Cir. 1938). The Court need not decide this issue, however, because the ICC had denied appellees' petitions for reconsideration prior to the time the court below considered the case on the merits.

tion were not mandatory, the protesting parties clearly had a right to ask the ICC to reconsider before they sought judicial review on the merits of the agency decision. *Cf. Resort Bus Lines, Inc.* v. *ICC,* 264 F. Supp. 742, 745 n. 6 (S.D.N.Y. 1967). Where permissive rehearing is sought "there is no final action until the rehearing is denied." *Outland* v. *CAB,* 284 F.2d 224, 227 (D.C. Cir. 1960) (Burger, J); *accord Samuel B. Frankin & Co.* v. *SEC,* 290 F.2d 719, 724 (9th Cir.) (*en banc*) *cert. denied,* 368 U.S. 889 (1961). Moreover, where a petition for rehearing is permissive and some parties file such petitions while other parties proceed directly to seek judicial review, the agency retains jurisdiction to decide the petitions notwithstanding the fact that judicial jurisdiction has attached. "That both tribunals have jurisdiction does not mean, of course, that they will act at cross purposes." *Wrather-Alvarez Broadcasting, Inc.* v. *FCC,* 248 F.2d 646, 648-49 (D.C. Cir. 1957). Obviously, where multiple parties are involved the right of one party to seek rehearing should not be frustrated by the decision of another party to seek judicial review without giving the agency an opportunity to reconsider.[34] *Id.*

It is perfectly clear, moreover, that in this case the ICC and the district court were not acting at cross

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[34] Many cases have pointed out that it is in the public interest to allow an agency to reconsider its decision prior to the invocation of judicial review. *E.g., The California Co.* v. *FPC,* 411 F.2d 720 (D.C. Cir. 1969); *Pan American Petroleum Corp.* v. *FPC,* 322 F.2d 999, 1004 (D.C. Cir. *cert. denied sub nom. Texaco, Inc.* v. *FPC,* 375 U.S. 941 (1963)); *Public Service Commission of New York* v. *FPC,* 284 F.2d 200 (D.C. Cir. 1960). Moreover, the right to seek reconsideration is a valuable one, for the ICC has on many occasions shown a willingness to reverse itself. *See, e.g., Jerry Lipps, Inc.* v. *United States,* 1968 F. Carr. Cas. ¶ 81972 (E.D. Mo. 1967); *Resort Bus Lines, Inc.* v. *ICC,* 264 F. Supp. 742 (S.D.N.Y. 1967).

purposes. The court did not forbid the ICC from proceeding with the matter even though the court was fully apprised of the pendency of the petitions for reconsideration. The appellees did not seek to have the court restrain further proceedings before the ICC, nor did they attempt to accelerate hearing of the case on the merits. Indeed, the record of the agency proceedings was not even filed with the court below until late in January 1969, well after the ICC had acted on the petitions for reconsideration, had reopened the record and had again awarded temporary authority to AFL.[35]

It is amply evident that appellees had no objection to the ICC's continued consideration of the petitions for reconsideration at the time they sought preliminary relief from the court below. Their contention that the ICC lost jurisdiction once the complaint was filed was made only in connection with the Commission's reopening of the record. It appears, therefore, that appellees' real position is that while the ICC retained jurisdiction to consider appellees' petitions for reconsideration, it lacked jurisdiction to act upon those pe-

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[35] Many regulatory statutes recognize the principle that an agency may modify or reconsider its decision until the record of the agency proceeding is filed in the reviewing court. *E.g.*, *Natural Gas Act*, § 19, 15 U.S.C. § 717r; *National Labor Relations Act*, § 10(d), 29 U.S.C. § 160(d). See, *In re NLRB*, 304 U.S. 486 (1938). Referring to such statutes, one court has suggested that the ICC may reconsider its decisions even *after* the record has been filed in a reviewing court:

> There appears to be no such cut-off date[in the Interstate Commerce Act], after which the Commission could not rescind or modify its orders, as is found in the National Labor Relations Act, 29 U.S.C. § 160(e) which prevents such action by the agency after the filing of the administrative transcript with the reviewing court . . . .

Alamo Express, Inc. v. *United States*, 239 F. Supp. 694, 697-98 (W.D. Tex., *aff'd per curiam*, 382 U.S. 19 (1965)).

titions by reopening the record. Such a position is clearly untenable. If the ICC had jurisdiction to reconsider its order, that jurisdiction was meaningless unless the Commission could also take whatever steps were necessary for complete reconsideration.[36]

CONCLUSION

Two important agencies of the United States Government—the Department of Defense and the Interstate Commerce Commission—have concluded, after careful deliberation, that an immediate and urgent need exists for the direct high-speed motor transportation service for which American Farm Lines has sought temporary operating authority. These agencies have also concluded, on the basis of several years of actual experience during which AFL's service was compared with that of other carriers, that service comparable to that provided by AFL is simply not available from other carriers. The Department's conclusions represent not only a judgment based upon its vast experience as a shipper, but also an exercise of its statutory obligation to assist in reducing the costs of Government. The ICC's decision to grant authority to AFL represents the expert judgment of an agency charged with primary responsibility for implementing national transportation policy.

During the time AFL served the Government under its exemption as an agricultural cooperative it demon-

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[36] In the present case the Commission's order reopening the proceeding expressly noted that new evidence and new arguments had been advanced in the replies to the petitions for reconsideration. Accordingly, in order to provide a complete record for reconsideration the Commission ordered the record reopened for submission of sworn evidence.

strated that it is a vigorous and healthy competitor. Its willingness to compete with existing carriers in terms of rates—a phenomenon that is rare within the motor transportation industry—is evidenced by fact that in the short time it has been serving the Government it has provided well over $1,000,000 in direct transportation cost savings. AFL's entry into this field precipitated massive opposition from the regulated carriers. Literally dozens of carriers, joined by their national trade association, the American Trucking Associations, Inc., have protested AFL's efforts to obtain operating authority from the ICC. These carriers have initiated lawsuits against AFL and have supported restrictive legislation, all in an effort to eliminate competition.

The present case represents perhaps the most successful result that has been achieved so far by AFL's competitors. On the basis of highly-technical procedural arguments, they have induced the district court to nullify the Interstate Commerce Commission's decision that AFL should be permitted to compete with the existing carriers as a certificated common carrier itself. The result the carriers have thus achieved is even more extraordinary when it is understood that the authority granted to American is merely temporary authority. If, upon the completion of the more formal adjudicatory proceeding involving AFL's application for permanent authority, it is decided that AFL should not be so certificated on a permanent basis, AFL's license as a competitor will terminate and appellees will be free from this obviously nettling competitive force.

For the foregoing reasons AFL respectfully urges the Court to reverse the judgment of the District

Court and to direct the entry of judgment for appellants.

Respectfully submitted,

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December 31, 1969

APPENDIX A

I. 49 C.F.R. § 1131.2

§ 1131.2 Filing of applications.

(a) *General.* All temporary authority applications are filed at and initially processed by the Commission's field offices. The field staff of the Commission's Bureau of Operations conducts preliminary investigations into applications for temporary authority and transmits the applications, with recommendations as to their disposition, to the Commission's Temporary Authorities Board in Washington, D. C. The Bureau's field offices maintain records of authorized carriers and their operating authorities, and its staff members are available for consultation and to give assistance in the obtaining of motor carrier service, and guidance in the preparation of temporary authority applications and related supporting material, and in making rate, insurance, and other required filings. The field offices will furnish copies of necessary forms upon request.

(b) *How and where filed.* A separate application for each temporary authority sought must be filed on Form BOR-95 (§ 1003.1 of this chapter). The signed original and six copies of each application and all supporting documents must be filed with the Bureau of Operation's field office which has jurisdiction over the point at which applicant is domiciled, or such other field office as the Commission may designate in special circumstances.

(c) *Supporting statements.* Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a

certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary

authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

II. 49 C.F.R. § 1131.3

§ 1131.3 Processing of applications.

(a) *Notice to interested persons*—(1) *Service.* Notice of the filing of temporary authority applications tendered shall be given by the publication of a summary of the authority sought in the FEDERAL REGISTER, except that no such summary will be published in the case of emergency temporary authority applications. Such summaries will be prepared by the appropriate Bureau of Operations supervisor and forwarded to the Office of Proceedings, Washington, D. C.

(2) *Filing of protests.* Any interested persons who can and will provide all or any part of the proposed service may file a protest against the application. Such protest must be specific as to the service which such protestant can and will offer and must consist of a signed original and six (6) copies which must be filed with the district supervisor named in the FEDERAL REGISTER publication within 15 calendar days after the date notice of the filing of the application is published in the FEDERAL REGISTER. One copy of such protest must be served on the applicant or its authorized representative, if any, by U.S. mail or in person.

(b) *Publication of rates and charges.* A carrier may not lawfully perform transportation under a grant of temporary authority unless and until compliance has been made with the rate and other requirements of section 217 of the Interstate Commerce Act in the case of common carriers and of section 218 of the act in the case of contract carriers, as provided in § 1131.5.

(c) *Revocation for noncompliance, and reinstatement and extension of time for making compliance.* (1) Temporary

authority is approved subject to compliance within 30 days, or within such additional time as the Commission may approve, with the applicable provisions of the statute and the requirements, rules, and regulations prescribed by the Commission thereunder governing the filing of rate and contract publications, the filing of acceptable evidence of security for the protection of the public and designation of agents for service of process.

(2) If compliance is not made within the 30-day period, or within the time allowed in any extension thereof applicant will be notified that the temporary authority order is of no further force and effect. Where this occurs, applicant may make written request for reinstatement of the granting order if it so desires, provided (i) that such request is made within 20 days from the date of the notice, (ii) that good cause can be shown as to why compliance was not made within the time allowed, and (iii) that the request for reinstatement contains positive assurance that applicant is now able to and will comply immediately with all applicable requirements, if the order is reinstated.

III. 49 C.F.R. § 1100.101(g)

(g) *Petitions for reconsideration of appellate division decisions on review of board decisions.* When an appellate division has denied a petition seeking a reversal, change, or modification of a determination whether original or on review by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (e) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, APPELLANT

v.

BLACK BALL FREIGHT SERVICE, ET AL.

No. 382

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BLACK BALL FREIGHT SERVICE, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION[1]

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[1] Although the United Sates did not appeal from the decision below, it supports the Interstate Commerce Commission's position on the merits. This brief is filed for the United States as appellee in both No. 369 and No. 382 and for the Interstate Commerce Commission as appellee in No. 369 and is appellant in No. 382.

OPINIONS BELOW

The opinion of the district court (A. 388a–399a) is reported at 298 F. Supp. 1006. The orders of the Interstate Commerce Commission (A. 143a–144a, 367a–370a) are unreported.

JURISDICTION

The judgment of the three-judge district court was entered on March 26, 1969 (A. 400a). The notice of appeal in No. 369 was filed by American Farm Lines on May 23, 1969 (A. 7a). The notice of appeal in No. 382 was filed by the Interstate Commerce Commission on May 26, 1969[2] (A. 7a). Probable jurisdiction was noted in each case and the appeals were consolidated on October 27, 1969. Jurisdiction to review the district court's judgment is conferred by 28 U.S.C. 1253 and 2101(b). *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line R.R. Co.*, 353 U.S. 436; *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1.

STATUTES AND REGULATIONS INVOLVED

Section 210a(a) of the Interstate Commerce Act, as amended, 49 U.S.C. (1958 ed.) 310a(a); the Interstate Commerce Commission's temporary authority rules, 49 C.F.R. 1131; and certain of the Commission's rules of practice, 49 C.F.R. 1100, are set forth in pertinent part in Appendix A to this brief, pp. 29–33, *infra*.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may grant a motor carrier's application for temporary

[2] May 25, 1969 was a Sunday.

authority to perform immediately and urgently needed service under 49 U.S.C. 310a(a) when the carrier's application reasonably, but not literally, complies with the information requirements of the Commission's temporary authority rules.

2. Whether the Commission had jurisdiction to reopen its proceedings after protestants sought review by a three-judge district court and a single district judge issued a temporary restraining order.

STATEMENT

These consolidated cases are appeals from a judgment of a three-judge district court (A. 400a) setting aside the appellant Interstate Commerce Commission's grant to the other appellant, American Farm Lines (AFL), of temporary authority to perform certain transportation services[3] for the Department of Defense (DOD) pursuant to Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a) (A. 143a–144a, 367a–370a).[4]

1. *The Department of Defense and American Farm Lines.* AFL is an agricultural cooperative formed for the purpose of providing transportation services for its members, which also are agricultural coopera-

[3] The transportation services consist of movements of general commodities, including Class A and B explosives, moving on government bills of lading over irregular routes at reduced rates (see 49 U.S.C. 22), between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas on the one hand, and points in Washington, California, Nevada, Utah, and Arizona, on the other (A. 370a–371a).

[4] The Commission is not appealing from the court's decision setting aside the first of the two orders, and the argument below entirely concerned the validity of the second order.

tives. As such, it operates pursuant to the exemption from the Act's certificate requirements provided in Section 203(b)(5) of the Act, 49 U.S.C. 303(b)(5). In 1966, AFL began serving DOD. It did so without a certificate authorizing the service since the Commission construed Section 203(b)(5), as it then read, to allow cooperatives to transport freight for non-members to the extent that such transportation is "incidental and necessary" to the cooperatives' primary transportation activities. See *Northwest Agricultural Co-Op. Ass'n* v. *Interstate Commerce Commission*, 350 F. 2d 252 (C.A. 9), certiorari denied, 382 U.S. 1011.

AFL's ability to serve DOD was sharply curtailed in 1968 for two reasons. First, certificated munitions carriers obtained injunctions in private actions under 49 U.S.C. (Supp. IV) 322(b)(2), prohibiting AFL from making two consecutive movements for DOD and from transporting freight for any non-members except when going to pick up, or returning from delivery of, a member's freight.[5] Second, Congress amended Section 203(b)(5) in that year to restrict a cooperative's authorized transportation of freight for non-members to that "which is incidental to its primary transportation operation and necessary for its effective performance * * * [such transportation for non-members] shall in no event exceed 15 per centum of its total interstate transportation services in any

[5] *Munitions Carrier Conference, Inc.* v. *American Farm Lines*, Civil Nos. 67-487 and 68-148 (W.D. Okla., February 20, and May 28, 1968). The Commission intervened as a plaintiff in these actions to enforce the scope of the agricultural cooperative exemption contained in 49 U.S.C. 303(b)(5) prior to its amendment in 1968.

fiscal year, measured in terms of tonnage."[6] In the same amendment, Congress also specifically defined non-member service as including service to the government. See 82 Stat. 448–449.

2. *AFL's application for temporary authority.* In an effort to continue its service to DOD, AFL, in May 1968, filed an application under Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a) for temporary authority to serve DOD (A. 10a).[7] Approximately 125 motor and rail carriers protested. DOD filed a statement, dated May 15, 1968, in support of the application pursuant to the Commission's Temporary Authority Rules, 49 C.F.R. 1131.2(c)(A. 14a–15a). The Commission also had before it an earlier letter, dated April 30, 1968, from a representative of DOD to the General Manager of AFL stating that while DOD regarded AFL's service to be "fast, efficient, responsive, and economical," and that while it is "desirous" of further use of AFL's services, DOD nevertheless, "is not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (A. 392a–393a, 11a–12a; see also A. 139a–141a).

[6] Section 203(b)(5) had previously simply exempted from the Act's certificate requirements:

> [M]otor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined * * *. [49 U.S.C. (1964 ed.) 303 (b)(5).]

[7] In July 1968 AFL filed an application for permanent authority to serve DOD. Proceedings on that application are currently in process before the Commission (Docket No. MC–129908 (Sub-No. 1).

The Commission's Temporary Authority Board denied the application on July 12, 1968 (A. 141a-142a) but, upon AFL's petition for reconsideration, Division 1 of the Commission (acting as an Appellate Division) reversed the Board and on September 3, 1968 granted AFL temporary authority for 90 days (A. 143a–144a). Petitions for reconsideration were filed by more than 20 protesting carriers, some requesting a stay of the effective date of the grant of authority pending disposition of the petitions. The Commission refused such a stay (A. 146a, 147a, 148a), and its order became effective on September 16, 1968.

On September 26, 1968, while the petitions for reconsideration were still pending before the Commission protesting carriers sued for review of the Commission's order in the court below (A. 149a–158a). On October 2, 1968, after a hearing in which counsel for the government participated, a single judge temporarily restrained the operation of the Commission's order (A. 166a–167a); on October 9, 1968 the Commission itself ordered postponement of the operation of its grant in accordance with the order of the court (A. 169a–169b).

On October 16, 1968, DOD filed with the Commission a reply to the pending petitions for reconsideration which had been submitted by the protesting carriers; DOD's reply specified additional reasons in support of AFL's application (A. 391a). On October 17, 1968, along with a reply to the petitions for reconsideration, AFL filed a petition asking the Commission to reopen its proceeding (A. 391a). On November 5, 1968, the Commission ordered the reopening

of the proceeding for the stated purpose of receiving a verified statement from DOD specifying "the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers," and of receiving verified statements from protesting carriers in response to the statement to be submitted by DOD (A. 170a–171a). On November 12, 1968, the Commission notified the court of the reopening and moved for a stay of the judicial proceeding; this motion, however, never came on for hearing (A. 391a–392a).

3. *DOD's statement of need for AFL's services.* DOD's verified statement, given by Vincent F. Caputo, the Department's Director for Transportation and Warehousing Policy (A. 194a–209a), described the "tremendous volume of traffic" which must move between points in the regions covered by AFL's application (A. 194a–198a). A part of this traffic must move by the most expeditious means possible and, since air transport is for the most part prohibitively expensive, there is an "imperative" need for the most expeditious motor carrier service (A. 198a).

The statement noted that "in many, many instances" the carriers currently certificated to serve DOD had failed to meet this need (A. 198a), and gave three reasons for this inadequacy: (1) Most of the certificated carriers provide service only on a joint line basis, rather than single line, and a "substantial" part of their service requires the participation of at least three different carriers, with the result in some

cases of very substantial delays (A. 198a–199a); the statement listed numerous pairs of major shipping points between which no certificated carriers have single line authority (A. 201a–203a). (2) Virtually all of these carriers are regular route carriers and thus must travel along prescribed routes which are often less direct and thus more time consuming than routes which can be taken by carriers with irregular route authority (A. 199a). (3) Some regular route carriers use single drivers (who must be relieved at relay points) rather than two-man driving teams, and some also use power units which must be changed at relay points; as a result there are sometimes delays at the relay points when replacement drivers and power units are temporarily unavailable (A. 199a). DOD's statement then gave three examples of substantial delays occurring in movements where service was not available from irregular route carriers on a single line basis with the use of two-man driving teams (A. 200a).

Moreover, DOD stated, because the currently certificated carriers had only "bits and pieces of authority," none could provide comprehensive service for all commodities, including explosives, between all points in the two regions covered by AFL's application (A. 200a–201a). Because of delays inherent in the system based upon "bits and pieces" of authority, on occasion there have been failures in the coordination of transportation with production schedules (A. 204a) and failures to make connections for overseas transportation (A. 205a). Moreover, it is frequently impossible

for the same carrier to carry both explosives and non-explosives having the same destination (A. 206a).

DOD concluded by contrasting the service provided by the currently certificated carriers with the "completely flexible and highly expedited service" (A. 207a) offered by AFL. When DOD began using AFL in 1966, it "was immediately discovered that the service of American Farm Lines was superior to that available from presently certificated motor carriers because its service was invariably provided by use of 'two-man driving teams' operating over the most direct routes possible from origin to destinations and which was available between any and all points in broad multi-state territories" (A. 206a). Noting that AFL's service is used to complement rather than replace the service of the presently certificated carriers, DOD then listed five examples where AFL provided service meeting defense requirements which could not otherwise have been met by the currently certificated carriers (A. 207a–208a). Moreover, reliance upon the currently certificated carriers "results in higher cost to the taxpayers" (A. 204a).

In their responses to DOD's verified statement, the protesting carriers asserted that they had satisfactorily performed all services previously requested of them and that they were willing and able to perform any service requested of them by any shipper, including DOD (A. 392a).

4. *The award of temporary authority.* On December 19, 1968, the Commission made a new grant of temporary authority, this time for 180 days. It did so upon finding that DOD "in discharging its responsibility

for the conduct of the Nation's defense" has an imperative need for the most expeditious service between innumerable points within the United States and abroad and that DOD has experienced "inefficient and circuitous joint-line transportation by the use of existing carrier service," particularly in coordination of motor transportation with manufacturing schedules and with overseas transportation (A. 368a). It further found (A. 368a):

> (3) That [DOD] has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs;
>
> (4) That there is nothing in this record to establish that any of the protesting carriers provide a service to meet its needs;

The Commission concluded that the grant of temporary authority was necessary to assure the government of a flexible service "to complement rather than replace existing services" (A. 368a–369.).

5. *The ruling of the District Court.* On December 31, 1968, protesting carriers filed in the district court a supplemental complaint attacking the Commission's second order; on January 6, 1969, a single judge temporarily restrained the operation of that order as well (A. 382a–383a). After full hearing on the merits, the full three-judge court, on March 26, 1969, set aside the Commission's grant of temporary authority.[8] It held,

[8] Since the Commission's second order in effect superseded the first, this litigation concerns only the validity of the second order, that of December 19, 1968. The Commission and the United States have conceded, *arguendo*, throughout this litigation that AFL's temporary authority is valid only if the second order is valid.

first, that the Commission had no jurisdiction to reopen the proceeding after the court assumed jurisdiction and stayed the operation of the first Commission order (A. 395a–398a). In this connection, the Court also held that the protesting carriers' petitions for reconsideration of the Commission's first order were invalid under 49 C.F.R. 1131.6(a) (set forth in Appendix A, pp. 31–32, *infra*), and therefore that there was nothing properly pending before the Commission when it initiated the proceedings leading to the second order. The Court further held that the DOD supporting statement upon which the second order depended did not conform with the framework for such statements specified in the Commission's temporary authority rules, 49 C.F.R. 1131.2(c). Thus, the Court held, even if the reopening were proper, the Caputo verified statement failed to meet the requirements of 49 C.F.R. 1131.2(c)(8) and (9), in that it did not show any efforts by DOD "to obtain from existing carriers the service AFL seeks to provide, or the identity of any existing carriers who failed or refused to provide the needed service and the reasons given for any such failure or refusal" (A. 398a–399a). Having noted that in the April 30, 1968 letter DOD told AFL that it was not in a position to state that the existing service is inadequate, the court construed the Caputo verified statement as merely expressing DOD's "preference" for AFL's service (A. 398a). This, it held, did not constitute the "full compliance with all mandatory ICC rules" (in which category the literal language of subsections (8) and (9) falls) that is prerequisite to a grant of temporary authority (A. 398a).

ARGUMENT

INTRODUCTION AND SUMMARY

Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a), provides that whenever there is "an immediate and urgent need" for motor carrier service where there is "no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings," grant an application for temporary authority to meet the need. In 1965, after some twenty-five years of experience under the statute, the Commission adopted temporary authority rules, 30 F.R. 5836, 49 C.F.R. 1131. The rules include specifications of general categories of information to be set forth in shippers' statements supporting applications for temporary authority (49 C.F.R. 1131.2(c)). This information is intended, as the Commission explained in a subsequent public statement,* to assist the Commission in determining the extent and urgency of shipper need, as well as the capability of existing service to meet that need.

The court below held that the Commission's grant of temporary authority for American Farm Lines to serve the Department of Defense was invalid because of asserted deficiencies in that shipper's supporting statement of need. The grant was invalidated not because the court found the statement, with the other evidence of record, insufficient to support the findings required by the governing statute. Rather, it was solely because the court considered that the statement did not literally enough fit the framework that the

* See Appendix B, *infra*.

Commission had laid out in its rules for the purpose of gathering information pertinent to the statutory findings. Specifically, the court found that DOD had not given the particulars "mandatorily required" (A. 398a) by subsections (8) and (9) of 49 C.F.R. 1131.2 (c). These provide that a supporting shipper must state "(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers and the dates and results of such efforts" and "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reason given for such failure or refusal."

We believe that the district court held the Commission to a far too meticulous and rigid adherence to the literal language of the rule, giving too little attention to the underlying statutory purpose and the Commission's own intentions in promulgating the rules. The DOD statement did in fact provide the Commission with the information lawfully required for the statutory finding of a need that cannot otherwise be met, and thus the purpose of the rules was entirely satisfied. DOD documented its inability to obtain the needed service from other existing shippers and the reasons for such inability. The only literal failure of compliance with subsections (8) and (9) was the absence of complete listings of specific dates when DOD was denied service and of the names and addresses of all carriers which denied service. The failure of this unique shipper, with its vast volume of traffic moving among multitudinous points, to provide such details is entirely understandable, and

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their absence neither impaired the Commission's ability to make lawful findings justifying a grant of temporary authority nor prejudiced substantially the protestants' efforts to rebut AFL's application. Thus, there was reasonable compliance with the rules, as this Court has recently established by its summary affirmance in *Estes Express Lines* v. *United States*, 292 F. Supp. 842, affirmed *per curiam*, 394 U.S. 718.

Setting up these provisions of the Commission's rules as a procedural obstacle to the grant of needed temporary authority unduly hampers the Commission in exercising the discretion that Congress gave it in Section 210a(a) of the Act to deal with urgent public transportation needs. The Commission's purpose in adopting the rules was simply to facilitate its gathering of the information needed under the statute, and that purpose was achieved by DOD's statement. The Commission gave full and fair consideration to the protestant's objections, and its performance of its statutory duty should not be upset on insubstantial technical grounds.

Alternatively, the court below held that the temporary authority granted AFL was invalid because the pendency of judicial review of the Commission's earlier order deprived the agency of jurisdiction to entertain the DOD statement. But the administrative proceeding was then still in process because petitions for reconsideration that protestants had filed (consistent with the Commission's rules) were still pending after they filed their complaint seeking judicial review. In any event, the Commission has power to take action pending judicial review—whether parties

have previously requested it or not—so long as its action is not inconsistent with the jurisdiction of the reviewing court. See *Inland Steel Co.* v. *United States,* 306 U.S. 153, 159–160. Here, in contrast to the typical statute providing for judicial review in a court of appeals, there is no statutory limitation upon agency action pending review. And in this case there was no inconsistency between the Commission's receipt of the DOD statement (with prior notice to the court) and the judicial review proceeding, which had gone no further than the issuance of a temporary restraining order by a single judge. There was no prejudice to any party—other than the frustration of litigants' desire to preserve agency errors—when the Commission acted to correct the deficiency it discovered after the complaint for review was filed.

I

THE COMMISSION'S GRANT OF TEMPORARY AUTHORITY SHOULD BE UPHELD SINCE THERE WAS REASONABLE COMPLIANCE WITH THE COMMISION'S RULES AND EVIDENCE IN THE RECORD AS A WHOLE TO SUPPORT GRANT

Contrary to the view of the court below, Mr. Caputo's verified statement expressed more than the Department of Defense's bare "preference" for AFL's service (A. 398a), and thus reasonably complied with the temporary authority rules in the light of all the circumstances.

DOD's statement showed that a part of its "tremendous volume" of traffic—including that for which AFL's service was desired—required the most expe-

ditious service. In addition to cost considerations, DOD set forth two specific reasons why such service was necessary: (1) to coordinate DOD transportation with manufacturing schedules and (2) to coordinate domestic transportation with overseas movements (A. 204a–205a). Both of these reasons were cited by the Commission in its order (A. 368a). DOD further stated that most of the carriers serving it had only "bits and pieces" of authority, and it gave three reasons why such carriers were generally unable to provide the most expeditious service (A. 198a–199a, 200a–201a). DOD cited three specific instances of substantial time delay where service is provided by joint line service (A. 200a), numerous pairs of major shipping points between which there is no single line service available (A. 201a–203a), and, finally, five instances in which AFL, combining single line service with irregular routes and two-man driving teams, met DOD requirements that could not otherwise have been met by the currently certificated carriers (A. 207a–208a).

The district court found, without any analysis, that the DOD statement did not satisfy subsections (8) and (9) of 49 C.F.R. 1131.2(c). But in fact the statement did provide much of the information there specified. Thus, DOD did state whether it had made efforts to obtain the service from existing carriers, and graphically described the results of its efforts, as subsection (8) dictates. And it explained in detail the reasons why existing carriers were unable to provide the service needed, as subsection (9) contemplates. We acknowledge that the statement did not give the dates of DOD's efforts to secure service (as (8) fur-

ther asks) or the names and addresses of the carriers who do not provide service (as (9) specifies). But these are the only deficiencies, and it is not hard to understand why this unique shipper, with its enormous volume of varied traffic moving between multitudinous points, would find it substantially impossible to provide such intricate details. It was appropriate for the Commission to proceed without those details in this case, and their absence can offend only the most finicky notion of what constitutes reasonable compliance with the rules.

Given the fact that the Commission had before it the information it needed to determine whether AFL's application met the statutory requirements, it is difficult to see how the absence of names, addresses and dates prejudiced the protestants in this case. The numerous protestants introduced a great deal of evidence in opposition to the DOD statement (see A. 210a–363a) in which they attempted to show that existing carriers could provide the needed service. Their rebuttal failed to convince the Commission (A. 368a), but there is no reason to believe that names, addresses and dates would have changed the weight of the evidence. In short, DOD's statement and the responses of the protesting carriers, considered together, clearly provided ample basis for "a fair adjudication" of the merits of the application for temporary authority.[10]

[10] DOD's letter to AFL of April 30, 1968 (see p. 5, *supra*), goes only to the question of the weight to be given to the Caputo verified statement, a matter for the Commission, not the court. See *Roadway Express, Inc.* v. *United States*, 263 F. Supp. 154, 158.

The insistence of the court below upon rigid compliance with subsections (8) and (9) is inconsistent with Congress' intent in Section 210a(a) to confer a broad and flexible discretion on the Commission to deal with the public's urgent transportation needs. It converts an administrative rule intended only to facilitate the development of relevant information for the Commission's benefit into an inflexible procedural obstacle. Given the limited nature and purpose of the rule, its literal terms should not stand in the way of a Commission determination that a supporting statement reasonably complies with the rule as a whole and that, based on all the information available, temporary authority should be granted in the public interest.

This Court so held when it summarily sustained the Commission in *Estes Express Lines* v. *United States,* 292 F. Supp. 842, affirmed *per curiam,* 394 U.S. 718. In that case a three-judge district court upheld a grant of temporary authority even though shippers statements did not literally satisfy subsections (8) and (9), because in the circumstances of the case the shippers' responses were reasonable and the record as a whole justified the Commission's grant of authority. See also *Bell Lines* v. *United States,* Civil Action No. 3759 (S.D. W. Va.);[11] *Roadway Express, Inc.* v. *United States,* 263 F. Supp. 154, 157

[11] An appeal was noted to this Court by Bell Lines, and a jurisdictional statement was recently filed in No. 893, this Term, claiming a conflict with this case and *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash.).

(N.D. Ohio); *Superior Trucking Co.* v. *United States*, 302 F. Supp. 257 (N.D. Ga.).[12]

The result in *Estes* follows directly from the policy of flexibility expressed in Section 210a(a). That policy is intended to provide the Commission with a swift and procedurally simple ability to respond to urgent transportation needs. No formal adversary proceedings are required by the statute; the Commission can grant temporary authority "without hearings or other proceedings." Furthermore, decisions on temporary authority are expressly committed to the Commission's discretion and must be upheld if there is any evidence supporting them. See *Union Cartage Co.* v. *United States*, 244 F. Supp. 1005 (D. Mass.).[13] The only requirements imposed are that there be "an immediate and urgent need" and that existing service be incapable of meeting that need.

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[12] There is some support for the decision below in the decision by the same district court below (with two of the three judges being the same) in *Acme Cartage Co.* v *United States*, *supra*, n. 11. Although there is the suggestion in that opinion that full compliance with subsections (8) and (9) is mandatory, the narrow holding, however, is that less than full compliance is fatal where the information required by those subsections does not appear elsewhere in the record.

[13] The courts have consistently held that the test of validity of a Commission order granting or denying temporary authority is not whether it is supported by substantial evidence, as is the case where an order concerning permanent authority is under judicial review, but whether the Commission had legal authority and any evidence on which to act as it did in the circumstances before it. See, *e.g.*, *Roadway Express, Inc.* v. *United States*, 263 F. Supp. 154, 159 (N.D. Ohio); *Merchants Delivery Co.* v. *United States*, 265 F. Supp. 669, 671-672 (W.D. Mo.); and *Bert Hussey* v. *United States*, 271 F. Supp. 650, 653-654 (N.D. Calif.).

The construction of the Commission's temporary authority rules adopted by the court below is clearly inconsistent with the Congressional policy because it would limit the Commission's ability to act in emergency situations even though the record before it establishes the requirements of Section 210a(a). As the court observed in *Superior Trucking Co.* v. *United States, supra,* 302 F. Supp. at 263, "[i]t is particularly inappropriate to strictly bind an agency to regulations made under a statute designed to encourage summary procedures."

Nor is it reasonable to conclude that by adopting the temporary authority rules in 1965 the Commission intended to limit the flexibility which it had possessed since 1938, when Section 210a(a) was enacted. Rather "a reading of these rules indicate[s] that their purpose is to facilitate the Commission's handling of requests for temporary authority. The rules reflect no intention to reduce or relinquish its statutory discretionary power to issue certificates of temporary authority." *Roadway Express, Inc.* v. *United States, supra,* 263 F. Supp. 154, 159 (N.D. Ohio). This interpretation is supported by the Commission's statement of January 23, 1968, which described the purpose of the rules and warned that applications for temporary authority would be rejected if they did not "adequately" comply with the Commission rules.[14] The Commission explained that "Because of 'slip-shod' preparation of many of the applications, [Division 1]

[14] The full text is set forth in Appendix B to this brief, pp. 34–35, *infra.* (See also *Acme Cartage Co.* v. *United States, supra,* 290 F. Supp. at 456–457, n. 4.)

frequently has found it difficult to reach an informed and equitable decision," and that the failure of supporting statements to provide all the information required by 49 C.F.R. 1131.2(c) was a foremost cause for concern. In summary it stated:

> [A]ccording to the clarified policy, Division 1 will deny temporary authority applications in which, because of noncompliance with the rules, a fair adjudication is not possible on the record before the Commission, without prejudice, however, to the filing of a new application conforming to the rules.

Thus it is clear that the purpose of the rule was to facilitate the gathering of enough evidence to permit "a fair adjudication" by the Commission on the merits of an application, and not to restrict its own powers in dealing with emergency situations, or to confer special procedural benefits upon protesting carriers. As we have shown, there was such a "fair adjudication in this case."

Moreover, no significant or useful purpose under Section 210a(a) would be served by imposing a requirement that there must be literal and complete production in every case of each category of information sought by the rules. For example, as some appellees concede, a supporting shipper's statement would be in full and literal compliance with the rules if it stated simply that no efforts were made to obtain the urgently needed service from existing carriers.[15] This would not, of course, end the Commission's inquiry.

[15] Motion to Affirm of Consolidated Freightways, *et al.*, p. 26. As we have shown, DOD, the supporting shipper here, provided far more information than this.

It would still have to ascertain whether existing service was capable of meeting the claimed need. And opposing carriers would undoubtedly attempt to bring to the Commission's attention information showing that existing service could do the job. Additionally, the Commission's field staff would investigate this question. If all available information showed that existing service was capable of meeting the shipper's alleged need, the application for temporary authority would be denied under standards of the statute.

In short, the information requirements of the rule are simply an aid to the Commission in the exercise of its discretion under Section 210a(a). They confer no rights on protesting carriers and do not limit the Board's discretion. So long as there is reasonable compliance with the rule—thus avoiding the risks that applicants may not be treated equally, or that the Commission may not get quick access to the information it needs—the purposes of Section 210a(a) are met.

This is, therefore, not a case in which an agency has failed to adhere to rules, deliberately adopted to limit otherwise unfettered discretion, which conferred important procedural benefits upon individuals. *Service* v. *Dulles,* 354 U.S. 363; *Vitarelli* v. *Seaton,* 359 U.S. 535. Nor is it a case in which an agency required by rule to exercise independent discretion has failed to do so. *Accardi* v. *Shaughnessy,* 347 U.S. 260; *Yellin* v. *United States,* 374 U.S. 109. On the contrary, that is precisely what the Commission has done here. The protestants have had full and fair administrative con-

sideration of their position. Indeed, the position taken by the district court would deny an applicant (and shippers) equal consideration by setting up an artificial rule of pleading as an obstacle to the Commission's exercise of the discretion Congress entrusted to it in Section 210a(a).

II

THE COMMISSION HAD JURISDICTION TO REOPEN ITS PROCEEDING DESPITE THE COMMENCEMENT OF A JUDICIAL REVIEW PROCEEDING

After the Commission issued its first order, many protesting carriers filed petitions for reconsideration, some requesting a stay of the operation of the Commission order pending disposition of the petitions. The Commission refused the stay, and the order granting the temporary authority became effective. Shortly thereafter, some of the protesting carriers, including many which had petitioned for reconsideration, filed suit and the court, by a single judge, temporarily restrained operation of the Commission's first order. Meanwhile, the petitions for reconsideration were still pending, and after replies by DOD and AFL, the latter requesting a reopening of the Commission's proceeding, the Commission did reopen the proceeding. It was then that the Caputo verified statement was received, more than a month before the merits of the case were argued before the three judge court.

The district court erred in its alternative holding that the pendency of the review proceedings deprived the Commission of jurisdiction to reopen the administrative proceeding as it did. In fact, the administra-

tive proceeding was not yet completed, since the Commission still had pending before it the petitions for reconsideration filed by protestants. To be sure, this lack of administrative finality did not deprive the court of jurisdiction to issue the restraining order or to proceed with review of what the Commission had already done; it is clear that a court may provide temporary injunctive relief to prevent immediate and irreparable injury pending reconsideration of a Commission order if the order is already operative and the Commission does not provide needed relief, see *Pacific Inland Tariff Bureau* v. *United States,* 129 F. Supp. 472 (D. Ore.); *Cantlay & Tanzola* v. *United States,* 115 F. Supp. 72 (S.D. Calif.). But the fact that a court may have jurisdiction to review and to provide temporary injunctive relief does not however, mean that the Commission thereby loses all jurisdiction to complete the administrative process. Since the matter was still properly before the Commission, the Commission necessarily had jurisdiction to reopen it. Indeed, this authority does not even depend on the pendency of petitions for rehearing; Section 17 of the Act, 49 U.S.C. 17(6) and (7), "empowers the [C]ommission at any time to grant rehearings as to any decision, order, or requirement and to reverse, change or modify the same." *Baldwin* v. *Milling Co.,* 307 U.S. 478, 484. See also *Sprague* v. *Woll,* 122 F. 2d 128 (C.A. 2), certiorari denied, 314 U.S. 669.[16]

[16] The district court erred in concluding that the petitions for reconsideration were invalid and thus could not have the effect of keeping the administrative proceeding open. In granting AFL temporary authority, Division 1, acting as an appellate

When Congress has intended that the pendency of a proceeding to review agency action shall absolutely preclude further agency action in the matter, it has expressly provided that the jurisdiction of the reviewing court shall be exclusive and has established specific

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division, reversed the Temporary Authorities Board. Therefore, petitions for reconsideration could be filed under 49 C.F.R. 1100.101(g) of the Commission's General Rules of Practice, (p. 33, *infra*) which permits such petitions where an appellate division, as here, reverses the initial decision of a board.

Contrary to the ruling below, the provision for reconsideration in the temporary authority rules (49 C.F.R. 1131.6) does not restrict the right vested under the Commission's General Rules of Practice; in fact the latter are expressly incorporated in it. Rule 1131.6 merely spells out the right to petition for reconsideration of orders of the Temporary Authorities Board or the Division *initially* granting or denying temporary authority. The Commission has consistently recognized the right to petition for reconsideration of an order of Division 1, acting as an appellate division, which reverses an order of the Temporary Authorities Board. So, apparently, did the protesting carriers, many of them are appellees here, which filed the petitions. The court's rigid construction of the rules is itself plainly out of keeping with Rule 2 of the Commission's Rules of Practice, 49 C.F.R. 1100.2, which provides:

> The rules in this part shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented.

The court's reliance upon 49 C.F.R. 1100.101 (a)(2) is misplaced. That rule provides in relevant part:

> All decisions, orders, or requirements of a division of the Commission in any proceeding shall be considered administratively final, except * * * those wherein the division reverses, changes or modifies a prior decision by a hearing officer * * *.

The court's view that the Temporary Authorities Board, whose initial decision was reversed by Division 1, is not a "hearing officer" (A. 396a) is contrary to the definition contained in 49 C.F.R. 1100.5(f) which defines "officer" as including "* * * a board of employees * * *."

procedures for application to the court for a remand to permit further agency action. See, *e.g.*, Hobbs Act, 28 U.S.C. 2342, 2347(c), 2349; Federal Trade Commission Act, 15 U.S.C. 45(c); § 11 of the Clayton Act, 15 U.S.C. 21(c); Labor Management Relations Act, 29 U.S.C. 160(d), (e). But neither the Interstate Commerce Act nor the Urgent Deficiencies Act, which apply here, has any such provisions; the only limitation upon the Commission's power pending review by way of an action for injunction before a three-judge court is the principle—inherent in the nature of judicial review—that the Commission cannot act in a manner inconsistent with the jurisdiction of the court. See *Inland Steel Co.* v. *United States*, 306 U.S. 153, 159-160. No further limitation upon an agency can be inferred from the simple statutory establishment of review procedures; Congress has been careful to provide such limitations expressly when it has considered them appropriate, and their absence here is therefore meaningful."

There is no inconsistency here between the Commission's action in reopening the proceeding and issuing a second order upon further evidence, on the one hand, and the court's action supplying the temporary relief which the Commission had denied and the prospect of judicial review on the merits, on the other

"The Commission has proposed legislation to amend Section 17 of the Act to provide for review of its orders in courts of appeals. The proposed legislation would limit the Commission's power to reopen to the period prior to the docketing of the record (see S. 2242, 91st Cong., 1st Sess.), thus bringing the procedure for review into line with other statutes providing for review in the courts of appeals.

hand. The Commission informed the court of its action, and there was no evasion of the stay of the first order. The court had an opportunity to stay operation of the second order pending review and, in fact, did so.[18]

There was no prejudice to any party in the review proceeding.[19] Obviously, no party has a right to have an agency's errors preserved pending review. See *Wrather-Alvarez Broadcasting* v. *Federal Communications Commission*, 248 F. 2d 646, 648 (C.A. D.C.) The Commission reopened merely for the purpose of determining whether a deficiency discovered during review could be remedied before the full three-judge court commenced its review on the merits.[20] Absent any statutory prohibition, it was free to do so.

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[18] Since the Commission never lost jurisdiction, the permission of the court to reopen was not necessary. See *Atchison, Topeka* and *Santa Fe Ry. Co.* v. *United States*, 231 F. Supp. 422, 426–427 (N.D. Ill.) Cf. *Anchor Line Limited* v. *Federal Maritime Commission*, 299 F. 2d 124, certiorari denied, 370 U.S. 922.

[19] The protesting carriers had ample opportunity to reply to the Caputo statement, and they did so. They also obtained temporary relief from the second order and full review of that order.

[20] Before issuing its order of November 5, 1968, reopening the proceeding, the Commission was not only aware of the court's action restraining the operation of the first order but also of the court's decision in *Acme Cartage Co.* v. *United States*, *supra*, entered on October 4, 1968, both of which indicated deficiencies in the first order.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and the cause remanded with instructions to sustain the final order of the Commission by dismissing the complaints.

Respectfully submitted.

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DECEMBER 1969.

APPENDIX A

1. The Statute

Section 210a(a) of the Interstate Commerce Act, as amended, 49 U.S.C. (1958 ed.) 310a(a), provides:

> To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. * * *

2. The Temporary Authority Rules

49 C.F.R. 1131.2(c) provides:

> *Supporting statements.* Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and

urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

49 C.F.R. 1131.4(b)(4) provides:

Single-line service. Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

49 C.F.R. 1131.6(a) and (c) provide:

(a) *Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person.

(c) *Petitions for reconsideration.* The filing

of a petition for reconsideration of an order of Division 1 or the Temporary Authorities Board does not have the effect of automatically staying such order, and the grantee carrier may conduct the operations authorized by such order upon compliance with its tariff, insurance, and other requirements for the duration of the temporary authority, or until otherwise ordered.

3. Rules of Practice

49 C.F.R. 1100.1 provides:

SCOPE OF RULES (RULE 1)

The rules in this part govern procedure before the Interstate Commerce Commission in proceedings under the Interstate Commerce Act and related acts, unless otherwise directed by the Commission in any proceeding.

49 C.F.R. 1100.5(f) provides:

The term "officer," except as a different meaning is indicated in Rules 17(b), 57 to 66, inclusive, 71(a) and 78 (civil and corporate functionaries), includes: (1) a Commissioner, a board of employees (called an "employee board" in this part), an examiner, or special board composed of State representatives (called a "joint board" in this part), to which a proceeding (called "referred matter" in this part) is by order assigned or referred for hearing, consideration, or recommendation of an appropriate order thereon pursuant to provisions of law;[1] and (2) a Commissioner, an examiner, or other Commission employee before whom, without entry of an order of reference, a proceed-

[1] Such as sections 17 and 205 of the Interstate Commerce Act.

ing is assigned for hearing. The term "board" means either an employee board or a joint board as the context requires.

49 C.F.R. 1100.101(g) provides:

> *Petitions for reconsideration of appellate division decisions on review of board decisions.* When an appellate division has denied a petition seeking a reversal, change, or modification of a determination whether original or on review by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (e) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition.

49 C.F.R. 1100.225 prescribes "Special rules of practice governing the procedure of the Temporary Authorities Board" and other employee boards. In a footnote to the title of these special rules, it is provided that:

> The general rules of practice apply to the procedure of all employee boards except to the extent specifically provided for in Rules 200 and 225.

APPENDIX B

ICC POLICY RELEASE OF JANUARY 23, 1968

POLICY CLARIFIED FOR ICC ACTION ON APPLICATIONS FOR TEMPORARY AUTHORITY TO CONDUCT MOTOR CARRIER OPERATIONS

Requests for temporary authority to conduct regulated motor carrier service will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules.

The clarified policy will be administered by Division 1, which handles operating rights matters.

The Commission adopted this policy upon receiving recommendation from the Division because of the haphazard preparation of many of the more than 5,000 applications for temporary authority received annually. Most of the requests involve common carrier trucking. The applications usually result from an emergency or short term need of shippers, or when new products and commodities are developed and require immediate transportation services.

Because of "slip-shod" preparation of many of the applications, the Division frequently has found it difficult to reach an informed and equitable decision. Further investigation by the ICC staff often has been required in order to obtain necessary information. Foremost among the complaints in this area are those concerning failure of the applicant or his representative to submit supporting statements which contain all of the information required by Section 240.2(c) of the Temporary Authority Rules. These rules are set forth in Ex Parte No. MC–67, Motor Carrier Tem-

porary Authorities, 98 MCC 483, and 49 CFR 1131 (formerly 49 CFR 340).

According to the clarified policy, Division 1 will deny temporary authority applications in which, because of noncompliance with the rules, a fair adjudication is not possible on the record before the Commission, without prejudice, however, to the filing of a new application conforming to the rules.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees*

No. 382

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

BLACK BALL FREIGHT SERVICE, et al., *Appellees*

On Appeal From the United States District Court for the Western District of Washington

BRIEF OF RAILROAD APPELLEES

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BRIEF OF RAILROAD APPELLEES

QUESTIONS PRESENTED

1. Does the Interstate Commerce Commission have power to grant an application for temporary authority in violation of the minimum requirements and standards of its own rules and regulations implementing 49 U.S.C. 310a(a), and where neither condition imposed by the statute has been shown to exist, especially where the sole support-

ing shipper acknowledged there is already sufficient and satisfactory service?

2. Did the Interstate Commerce Commission have authority to reassert its jurisdiction and reopen its proceeding as to precisely the same issue as was being judicially reviewed without obtaining leave of the reviewing court?

STATEMENT OF THE CASE

These Railroad Appellees, named in the Appendix, believe that the Solicitor General's statement of the case gives a generally accurate and concise background of this litigation. For the purpose of this Brief, they adopt it.

They further believe that the statement of appellant American Farm Lines (AFL) omits significant background and contains matter of doubtful relevance to such an extent as to be of little value.

SUMMARY OF ARGUMENT

To enable the provision of motor carrier service, the Interstate Commerce Commission (Commission) may grant temporary authority, but only if it is demonstrated (1) there is an immediate and urgent need and (2) there is no carrier service capable of meeting such immediate and urgent need. 49 U.S.C. 310a(a). This proviso was added to the Motor Carrier Act in response to the Commission's request that it be empowered to cope with emergency situations.

In 1965 the Commission adopted implementing rules and regulations, 49 C.F.R. 1131, et seq., to govern the filing, processing and determination of applications. They are couched in terms of command.

AFL, an agricultural cooperative association judicially determined to have operated common carrier trucking serv-

ice for the government in violation of the Interstate Commerce Act, applied for temporary authority to transport commodities generally when moving on government bills of lading between all points in exceedingly broad areas.

The sole supporter was the Department of Defense (DOD), which had conceded it could make no contention that there would be insufficient or inadequate service without AFL. DOD expressed the desire to have AFL to render a complete, single-line service, to haul every known commodity between thousands of combinations of points, a type of service not contemplated by the Commission's rules. Its initial letter of support clearly failed to comply with the minimum requirements set forth in the rules, and this was later conceded by the Commission and the Solicitor General. It made no representation respecting immediate or urgent need. It claimed no emergency. DOD had used the services of AFL conducted under the claimed protection of 49 U.S.C. 303(b)(5), considered them to be desirable, and here supports their continuation. But much of the service found to be desirable had been unlawfully conducted. On two occasions AFL was enjoined from handling government shipments which were not incidental to farm-related movements. Subsequently, it was held to be in contemptuous violation of the injunctive orders. Also, Congress amended 49 U.S.C. 303(b)(5), effective July 26, 1968, among other things, limiting a cooperative's nonfarm-related transportation to fifteen per cent of total tonnage.

Numerous existing carriers protested the application. It was denied by the Commission's Temporary Authorities Board. However, Division 1, acting in its appellate capacity, overruled the Board and granted the application by order dated September 3, 1968. The original plaintiffs below filed complaint alleging the order was unlawful and void in that the Commission failed to comply, and failed

to require AFL to comply, with its temporary authority rules. They also filed motion for an order to stay the going into effect of said order. Pursuant to an extended hearing —the government at that time vouched for the validity of the Division's order—the lower court entered its order staying the order of September 3 "pending a determination by this Court of the issues of this proceeding, or until the further order of the Court."

Without obtaining leave of the court, Division 1 reopened the Commission's proceeding, received the verified statement of DOD's Vincent F. Caputo, and, by order of December 19, 1968, again granted the application.

These Railroad Appellees timely filed a motion to strike the Caputo statement on the ground the district court had assumed jurisdiction of the subject matter and that, in any event, it failed to meet minimum requirements of the rules even if considered together with the initial statement. The motion was never ruled upon expressly.

Some appellees filed petitions for reconsideration of the order of December 19.

A supplemental complaint was filed in the district court. It was therein contended that the second order was in contravention of the jurisdiction of the court and not in compliance with the Commission's rules. A stay was requested and granted.

On the merits, the court held that the order of September 3 (now conceded to be deficient) was void for lack of compliance with the implementing rules, that because jurisdiction had vested in and had been exercised by the court the Commission lacked authority to enter its order of December 19, and, in addition, the Caputo statement did not meet the minimum requirements of the rules. The court may have

additionally concluded (A. 398a) that the Commission could not grant the application in view of AFL's failure even to allege facts satisfying the conditions imposed by 49 U.S.C. 310a(a).

DOD has at no time urged urgent or immediate need. It admits there is already capable carrier service. It concedes it can make no contention that available service is insufficient or inadequate. Thus, the application does not fall within the ambit of the statute, for its purpose is not to enable the provision of service for which there is an immediate and urgent need where there is no carrier service capable of meeting such need.

Further, it does not comply with the requirements of the Commission's rules. It does not square with the Commission's definition of "immediate and urgent need." Its complete, single-line service concept is rejected by the rules as ground for temporary authority. And, both of its supporting statements fail to meet minimum evidentiary requirements. While appellants contend they should not be required to comply literally with rules prescribing minimum information required to be specified in supporting statements, a contention which flies in the face of the language employed by the Commission, they make no attempt whatsoever to explain away the failure to comply with the equally important provisions just noted above.

The Commission's rules have the same force and effect as law and are subject to the same tests as statutes. They are as binding upon the Commission as the public. If this Court finds they were applicable and were violated, the case is ended. *Service* v. *Dulles,* 354 U.S. 363.

The lower court's alternative holding also should be affirmed. When the Commission's Division 1 acted as an appellate division, as it did, the administrative process was

ended. This is made clear even by the Commission's own rules of procedure. 49 C.F.R. 1100.101(a)(2) and 1131.6(a). The Commission had no power, without leave of the court below, to reopen its proceeding and to act inconsistently with the court's jurisdiction. *Inland Steel Co.* v. *U.S.*, 306 U.S. 153. No such leave was asked or given.

ARGUMENT

1. The Purported Support Fails To Satisfy The Commission's Own Rules Governing Filing, Processing And Determination Of Temporary Applications Or Either Of The Two Conditions Imposed By The Underlying Statute, Especially In View Of The Admission There Is Already Sufficient And Adequate Service.

The Motor Carrier Act of 1935, 49 U.S.C. 301 et seq., made no provision for issuance of temporary operating authorities. The Commission found it was powerless to deal with emergency situations. In a letter to both houses on February 25, 1938 (Sen. Doc. No. 154, 75th Cong., 3rd Series, pp. 2-3), its Chairman requested such authority because:

> "Cases arise, and have been brought to our attention, where *urgent need* for interstate motor carrier service *suddenly develops.* The *bringing in of oil wells in a new field* and conditions created by a flood or other *calamitous visitation* are good examples, and there are others." (Emphasis added.)

Congress thereupon enacted 49 U.S.C. 310a(a), giving the Commission power to grant temporary authority to enable the provision of service for which there is immediate and urgent need, but only where there is no carrier service capable of meeting such immediate and urgent need.

In 1964, the Commission instituted a rule-making proceeding to determine whether implementing rules and regulations should be prescribed to *govern* the filing, processing and determination of applications for temporary authority. In 1965, rules were adopted. *Ex Parte No. MC-67, Motor Carrier Temporary Authorities,* 98 M.C.C. 483, 49 C.F.R. 1131, et seq.

As will be shown, the adopted rules were couched in mandatory terms requiring strict compliance and interpretation. Contentions that it did not really mean what it plainly said have been renounced by the Commission itself.

At Page 39 of the *Seventy-ninth Annual Report of the Interstate Commerce Commission* submitted December 31, 1965, it was said:

> "••• The rules *require* more complete information to be furnished by carriers and shippers, and set forth *minimum standards of proof necessary for a grant of authority.* •••" (Emphasis added.)

And, on January 23, 1968 the Commission issued a policy release, 2 CCH Fed.Car.Rep. ¶23114, in which it was stated in part:

> "Requests for temporary authority to conduct regulated motor carrier service will be *turned down* if the applications do not adequately comply with Interstate Commerce Commission rules. •••" (Emphasis supplied.)

The implementing rules and regulations clearly were calculated to insure adherence to the conditions imposed by the underlying statute and the legislative history. In part, they provide (all emphasis added):

> "240.4(b) [49 C.F.R. 1131.4(b)] *Standards for determination*—The following standards *shall* be used •••.

"(2) *Immediate and urgent need.*—An immediate and urgent need justifying a grant of temporary authority will be determined to exist *only* where it is established that there is or soon will be an *immediate* transportation need which *reasonably* cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination *not presently served* by carriers, a discontinuance of existing service, *failure of existing carriers to provide service,* or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed.

• • •

"(4) *Single-line service*—Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service *will not warant* a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized *only* when it is clearly established that the carriers providing multiple-line service are not capable of, *or have failed in,* meeting the *reasonable immediate and urgent needs* of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

"(5) *Complete service.*—Requests for temporary authority on the basis of 'providing a complete service to a shipper,' even though existing carriers are participating in the traffic and in many instances can provide a substantial part of the service, require special justification. Generally, in such instances, the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper *in their authorized territories,* or that the supporting shipper *has revised its distribution methods* to such an extent that there actually is an immediate and urgent need for the complete service proposed."

• • •

Rule 240.2(c) [49 C.F.R. 1131.2(c)] provides:

> *"Supporting statements.*—Each application for temporary authority *must* be accompanied by a supporting statement(s) designed to establish an *immediate* and *urgent* need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense *must* contain a certification of its accuracy and *must* be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement *must* contain *at least* the following information:
>
> • • •
>
> "(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."
>
> • • •

In the face of the clear provisos and requirements of the statute and its implementing rules as noted above, appellant AFL, an agricultural cooperative association,[1] applied for

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[1] Until AFL applied to the district court for stay of its order pending appeal, there was no suggestion that it intended to assume common carrier status and at the same time, with the same equipment, operate under the agricultural cooperative exemption. The questionable legality of such a proposal thus is not at issue. However, on November 18, 1969 an Interstate Commerce Commission hearing examiner concluded that such an operation would be repugnant to the public interest, contrary to the National Transportation Policy, and in violation of 49 U.S.C. 303(b)(5). Docket MC-133250 (Sub 2), *United Agricultural Transportation Association of America Marketing Co-Op Application.*

temporary authority (A. 10a) to transport every conceivable commodity when moving on government bills of lading between all points within broad areas, on the theory there is now no *one* existing carrier authorized to render *complete, single-line* service between *all* combinations of the thousands of points involved.

The sole supporting shipper is DOD, which submitted a supporting letter.

The Commission also had before it letters of DOD stating that while the continuation of AFL's service was considered desirable,[3] DOD was not in position to represent that there would be insufficient or inadequate service without it. (A. 11a; A. 13a; A. 393a).

A large number of existing carriers protested. In their Protest (A. 127a) these Railroad Appellees pointed out noncompliance with the provisions of the pertinent statute and the implementing rules, that the deficiences in the supporting letter deprived them of their right guaranteed by the rules to make a specific showing of their capabilities,

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[3] Much of the service desired to be continued was unlawful. In two proceedings in which appellant Commission intervened on the side of plaintiffs, AFL was enjoined from conducting general hauling for the government which had no incidental relationship to its farm-related purpose. *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, Civil Nos. 67-487 and 68-148 (W.D. Okla., February 20, and May 28, 1968), affirmed *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, 415 F. 2d 747 (10th Cir. 1969). Later, plaintiffs alleged the injunctions had been violated. The district court agreed. It was concluded, among other things, that AFL's primary concern was the government, not cooperative membership traffic. *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, 303 F. Supp. 1078 (W.D. Okla. 1969), appeal docketed.

and that the Oklahoma injunctions precluded a finding of fitness.[3]

The application was denied by ICC's Temporary Authorities Board.

AFL filed petition for reconsideration and the Commission's Division 1, acting as an appellate division, purportedly granted the application by order dated September 3, 1968. (A. 143a). The Solicitor General does not contend that this order was valid. (Br. pp. 3, 15, 27).

On September 26, 1968, nine regulated motor carriers and an association of carriers[4] filed their complaint in the United States District Court for the Western District of Washington, Southern Division. It was therein alleged that the Order of September 3, 1968 was beyond the lawful authority of ICC and was wholly unlawful and void in that the Commission failed to comply, and failed to require AFL to comply, with its formally promulgated rules prescribing minimum standards relating to the filing, processing and determination of temporary authority applications. (A. 149a). This was the sole issue presented. At the same time, they filed motion for an order to stay the going into effect of said order. The motion was argued before Judge George Boldt on October 2, 1968.[5] He entered a stay order (A.166a).

On November 5, 1968 the Commission's Division 1, again acting as an appellate division, reopened the proceeding

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[3] Fitness of the applicant is an issue. 49 C.F.R. 1131.4(b)(8)(ii). Neither of the granting orders hereinafter referred to made a finding relating to AFL's fitness.

[4] Additional motor carriers and the railroad appellees later became intervening plaintiffs.

[5] Although the government now concedes the order was deficient, it vigorously resisted stay on the ground the order was valid (A. 159a).

(A. 170a), and, on December 19, 1968, it again granted the same authority, in the same proceeding, after receiving the verified statement of Vincent F. Caputo, Director for Transportation and Warehousing Policy, DOD (A. 194a).

On December 31, 1968 plaintiffs below filed in the district court their supplemental complaint (A. 371a) in which the only issues raised (A. 373a) were whether the order of December 19 was unlawful by reason of being in contravention of the jurisdiction of the lower court and not in compliance with the implementing rules and regulations. A motion to stay also was filed.

Issuance of the temporary authority was again stayed (A. 383a), and after hearing on the merits, the 3-judge court filed its Opinion and Judgment on March 26, 1969 (A. 388a). The court held (1) that the order of September 3, 1968 was void for lack of compliance with the rules, (2) that inasmuch as the court assumed and retained jurisdiction of the controversy, the Commission was without authority to issue its purported order of December 19, 1968, and, (3) in any event, the Caputo verified statement did not meet the standards and minimum requirements prescribed by the implementing rules.

The court may have additionally concluded (A. 398a) that a grant of this application would exceed the Commissions' authority due to failure of the application to satisfy either of the conditions imposed by the statute. Whether or not the court intended to express such a view, it is axiomatic that implementing rules have no application if the terms of the underlying statute have not been met.

Appellants concede (Solicitor General's Br. p. 16; AFL Br. p. 21) that the Commission did not fully comply with its rules. They admit that the Caputo statement did not supply required information, but take the position there

was substantial or reasonable compliance, that strict compliance is not necessary, and that appellees have suffered no prejudice.

As pointed out in their protest (A. 127a) and motion to strike the Caputo statement (A. 363a), these appellees were highly prejudiced in their efforts to protect their traffic. They were denied the right guaranteed them by 49 C.F.R. 1131.3(a)(2) to make a specific showing of their carrier capabilities. It was impossible for them to answer DOD's broad and vague generalities with specificity. Further, they have been prejudiced by loss of tonnage to one granted temporary authority in defiance of governing rules.

No claim has been made that there is lack of carrier service. It is only contended that there is no single carrier authorized to render a *complete, single-line* service between every point within a nine-state area, on the one hand, and, on the other, every point within a five-state area. But, the Commission's standards for determination, *supra*, do not contemplate temporary authorizations of those types of services.[8] There is no showing that DOD is faced with "a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service [or] failure of existing carriers to provide service". Further, there has been no contention that there is an *immediate* need or an *urgent* need of the service proposed. There is no allegation that existing carriers cannot *reasonably* meet DOD's requirements. These standards of determination, ignored by appellants in their Briefs, have been wantonly violated. There is no assertion they have been complied with reasonably, substantially, or at all. In fact,

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[8] Significantly, the district court took note of the rule regarding single-line service. 49 C.F.R. 1131.4(b)(4). (A. 394a).

Appellants' Questions Presented[7] on this issue are limited to the sufficiency of the information required by 49 C.F.R. 1131.2(c).

Rules and regulations promulgated by the Commission pursuant to statutory authority have the force and effect of law, and concededly are subject to the same tests as statutes. *Atwood's Transport Lines* v. *U.S.*, 211 F. Supp. 168, 170, affirmed per cur., 373 U.S. 377. Regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and this principle holds even when the considered administrative action is discretionary in nature. *Service* v. *Dulles*, 354 U.S. 363; U.S. ex rel. *Accardi* v. *Shaughnessy*, 347 U.S. 260.

In *Service* this court said (372):

> "**** *Second*, petitioner contends that the Secretary's action is subject to attack under the principles established by this Court's decision in United States, ex rel. *Accardi* v. *Shaughnessy*, 347 U.S. 260, namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature.*** *Since, for reasons discussed hereafter, we have concluded that petitioner's second contention must be sustained, we do not reach the first.*
>
> "The questions to which we address ourselves therefore are as follows: (1) Were the departmental Regulations here involved applicable to discharges effected under the McCarran Rider? and (2) Were those Regulations violated in this instance? We do not understand the respondents to dispute that the principle of United States ex rel. *Accardi* v. *Shaughnessy* (US) *supra*, is controlling, if we find that the Regulations were indeed applicable and were violated. We might also add that

[7] Solicitor General's Brief, page 3; AFL's Brief page 3.

we are not here concerned in any wise with the merits of the Secretary's action in terminating the petitioner's employment." (Emphasis ours.)

The rules, as above shown, are couched in terms of command. In both its annual report and policy release, *supra*, the Commission made it clear this was no accident. The rules and regulations are binding upon the Commission, and the district court correctly so concluded.

Appellants rely upon four decisions to support their contentions that the rules may be disregarded. In *Roadway*[8] no question relating to them was raised before the Commission, and the reviewing court deemed the point to be waived. In *Estes*,[9] the decision in *Acme Cartage Co.* v. *U.S.*, 290 F. Supp. 453, which was relied upon in great measure by the lower court in the instant proceeding, was distinguished on the facts. In *Superior*,[10] both *Acme* and the instant case were distinguished on the facts. In *Bell*,[11] the court found that many of the supporting letters responded to every requirement. These cases do not help appellants.

If the lower court concluded (A. 398a) that neither condition in the underlying statute, 49 U.S.C. 310a(a), has been met, its holding was correct. The statute provides that the Commission may grant temporary authority to enable the provision of service where there is an immediate and urgent need therefor, and where the points or areas involved are without service capable of meeting the immediate and

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[8] *Roadway Express, Inc.* v. *U.S.*, 263 F. Supp. 154.

[9] *Estes Express Lines* v. *U.S.*, 292 F. Supp. 842, affirmed per cur., 392 U.S. 718.

[10] *Superior Trucking Co.* v. *U.S.*, 1969 CCH Fed.Car.Cas. ¶82108.

[11] *Bell Lines* v. *United States*, 1 CCH Fed.Car.Rep. (1969 Fed.Car.Cas. ¶82139) (S.D. W.Va. 1969), *appeal docketed*, No. 893, 1969 Term.

urgent need. No lack of service is claimed. On the contrary, as seen, DOD frankly admitted it was not in position to state that there would be *insufficient* or *inadequate* service without AFL. No grant is here required "to enable the provision of service" because sufficient and adequate service concededly is already available. And, as mentioned above, there is no allegation relating to immediate need, urgent need or emergency. Consequently, the Commission did not have before it an application to enable the provision of service for which there is an immediate and urgent need where there is no capable carrier service.

2. The Commission Lacked Authority To Reopen Its Proceeding And Act Inconsistently With The Reviewing Court's Jurisdiction Without Leave Of The Court.

On October 2, 1968, Judge George Boldt entered an order (A. 166a) staying the order of the Commission's Division 1, acting as an appellate division, of September 3, 1969 *"pending a determination by this Court of the issues of this proceeding, or until the further order of the Court"*. (Emphasis supplied).

After recognizing the action of the district court and staying its order of September 3 (A. 169a) the Commission's Division 1, again acting as an appellate division, reopened the proceeding as to precisely the same issue as was being judicially reviewed (A. 170a). The verified statement of Vincent F. Caputo (A. 194a), was received, and Division 1, again acting as an appellate division, by order of December 19, 1968, again granted the authority (A. 367a).

Meanwhile, on November 12, 1968, seven days *after* the Commission had purportedly reopened its proceeding, it filed in the district court its motion to stay further proceedings therein (A. 167a). However, no action was ever taken to note the motion for hearing or otherwise to pro-

cure the stay sought (A. 392a). That is the reason the motion, as stated at page 7 of the Solicitor General's Brief, "never came on for hearing".

While some appellees replied to the Caputo statement, these Railroad Appellees moved to strike it (A. 363a), pointing out that the district court had assumed jurisdiction of the subject matter, and that whether considered separately or in concert with DOD's initial statement, it failed to meet minimum requirements and the standard of determination of the Commission's implementing rules and regulations. The motion to strike has never expressly been ruled upon.

Some appellees filed petitions to reconsider or stay the order of December 19. However, the administrative proceeding had already terminated.

The Commission's temporary authorities rules of procedure permit petitions for reconsideration to be directed *only* at orders of the Temporary Authorities Board and of Division 1 *initially* granting or denying applications. 49 C.F.R. 1131.6(a)[12]. Appellants' contentions that the Commission's general rules of practice should take precedence over the special rule applying only to temporary authorities collide with the rule of construction that specific terms shall prevail over general terms in the same or another statute which otherwise might control. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228. Thus, when Division 1 acted as an *appellate* body, as it did in

[12] "*Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person."

promulgating its order of September 3, the administrative function was at an end. This is further evidenced by the fact that the Commission's General Rules of Practice, 49 C.F.R. 1100.101(a)(2)[13], provide that orders of a division in any proceeding shall be considered administratively final, except those declared to involve an issue of general transportation importance, those wherein the *initial* decision is rendered by a division, or those wherein a division reverses, changes or modifies a decision by a *hearing officer*. As noted by the court below (A. 396a), the disposition of an application by a Board does not constitute a hearing before a hearing officer. *Trans-American Freight Lines, Inc.* v. *U.S.*, 258 F. Supp. 910 (1966).

Under its own rules of proceedure, issuance of the order of September 3, 1968, completed the administrative process. The district court properly accepted and exercised jurisdiction to judicially review the assailed order. Pursuant to an extended hearing (A. 159a; 395a) the court stayed the purported order pending its determination of the issues or until the further order of the court. No such further order was made. The Commission, *after* its purported reopening, filed its motion for stay of the court's order, but never bothered to note it for argument.

Subsequent actions of the Commission, in addition to being unauthorized by its own rules, were taken without leave and in defiance of the lower court's order of October 2, 1968. This, it could not lawfully do. The lower court so held (A. 395a).

---

[13] "All decisions, orders or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes or modifies a prior decision by a hearing officer, and those wherein the initial decision is made by a division.***"

The Solicitor General (Br. 23-26) and AFL (Br. 39-41) hinge their arguments on the notion that the Commission was free to act because the administrative proceeding had not been completed due to the filing by some appellees of petitions for reconsideration. But, under rules promulgated by the Commission itself, such petitions could not be entertained, and no further Commission proceedings could be had after Division 1 had acted as an appellate division.

The Solicitor General concedes, citing *Inland Steel Co. v. U.S.*, 306 U.S. 153, (Br. 26) that the Commission could not act in a manner inconsistent with the jurisdiction of the court. Yet, that is precisely what it did. It attempted to reassert its jurisdiction and reopen its proceeding as to the same issue as was being judicially reviewed without obtaining leave of the reviewing court which had stayed the assailed order "pending a determination by this Court of the issues of this proceeding, or until the further order of the Court."

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted,

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February, 1970.

CERTIFICATE OF SERVICE

I, Ed White, a member of the Bar of this Court, hereby certify that copies of the foregoing Brief of Railroad Appellees have been served by me this second day of February, 1970 on all parties required to be served by mailing copies thereof by air mail, postage prepaid as follows:

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APPENDIX

NAMES OF RAILROAD APPELLEES

The Atchison, Topeka and Santa Fe Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago and North Western Railway Company
Chicago, Burlington and Quincy Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Colorado and Southern Railway Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Fort Dodge, Des Moines and Southern Railway Company
Fort Worth and Denver Railway Company
Great Northern Railway Company
Green Bay and Western Railway Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Illinois Terminal Railroad Company
The Kansas City Southern Railway Company
Missouri-Kansas-Texas Railroad
Missouri Pacific Railroad Company
Norfolk and Western Railway Company
Northern Pacific Railway
St. Louis-San Francisco Railway Company
Soo Line Railroad Company
The Texas and Pacific Railway Company
Toledo, Peoria and Western Railroad Company
Union Pacific Railroad
Waterloo Railroad

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*,

v.

BLACK BALL FREIGHT SERVICE, *ET AL.*, *Appellees*.

No. 382

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

BLACK BALL FREIGHT SERVICE, *ET AL.*, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEES CONSOLIDATED FREIGHTWAYS CORP., ET AL.[1]

Questions Presented

1. The first issue in this case is not, as phrased by appellants, whether the Interstate Commerce Commission may grant a motor carrier's application for temporary authority "when the carrier's application reasonably, but

---

[1] This brief is submitted on behalf of four of the appellees: Consolidated Freightways Corporation of Delaware; Riss & Company, Inc.; Tri-State Motor Transit, Inc.; and Yellow Freight System, Inc.

not literally, complies with the information requirements of the Commission's temporary authority rules" (Gov't Br. pp. 2-3; see also AFL Br. p. 3). Had the lower court considered that there had been "reasonable" compliance with the regulations, it doubtless would, and should, have approved the Commission's action. The question, rather, is whether the carrier's application did in fact "reasonably comply" with the Commission's regulations, and whether if it did not the Commission's order granting the application should be set aside.

2. Assuming that the application, as supplemented by the material submitted upon the reopening of the proceeding by the Commission, did comply with the Commission's regulations, the second issue is whether the Commission's grant of the application should nonetheless be set aside on the ground that the Commission had not secured leave of the lower court to reopen the proceeding.

Statement of the Case

While the Solicitor General's statement of the case is, by and large, to the point, that of American Farm Lines ("AFL") emphasizes elements that are of marginal relevance at best and discusses them in such fashion as to require us to sketch the background of this controversy in somewhat more detail than we otherwise would.[2]

As AFL would have it, this dispute comes about because of legislation that "was introduced in Congress with the support of the American Trucking Associations, Inc."—the representative of the "entrenched carriers"— and because of litigation brought against AFL by "a group of common

[2] To avoid confusion in references on the one hand to the joint brief for the Interstate Commerce Commission and the United States, and on the other to the actions of the Commission, we refer herein to the brief, and the positions set forth in that brief, as the Solicitor General's. (The United States did not appeal, but on the merits supports the Commission.)

carriers . . . whose rates were generally higher than those" of AFL and who were "attempting to impose severe limitations" on AFL. But these efforts were, in this view of the case, thwarted before the Commission because the Department of Defense, despite an "attempt" of the American Trucking Associations "to bring pressure . . . by going directly to the Secretary," stood fast in its support of AFL. However, the "massive opposition" of the regulated carriers, triggered by AFL's "willingness to compete with existing carriers in terms of rates—a phenomenom that is rare within the motor carrier industry"—"induced the district court" to set aside the Commission's action "on the basis of highly-technical procedural arguments" (AFL Br. pp. 5, 6, 7, n. 8, 28, 49).

The facts are as follows:

1. *Background.* This litigation arises basically out of a struggle between a type of carrier exempt from Commission regulation—the cooperatives—and the regulated carriers for the business of shippers that are not members of the cooperatives. The exempt cooperative carriers, naturally enough, want to supplement their income by carrying the traffic of non-members, particularly where that business would enable them to avoid "deadheading" equipment to its origin after transporting shipments for their members. Since they are not regulated and consequently cannot be charged with discrimination, they are free to charge as little as they wish for such movements; and of course anything they receive will be better than nothing. Moreover, they are free to solicit and accept only the most profitable traffic, since they are not "common carriers." The regulated common carriers, on the other hand, regard these activities by the cooperatives as an unfair infringement on their business, since in general the regulated carriers are obliged by law not to vary their rates whether or not the conse-

quence is the "deadheading" of equipment and since they are obliged to carry all traffic, profitable or not.[3]

2. *The* Northwest *decision and its consequences.* Until about 1966, this clash between the exempt cooperatives and the regulated carriers was relatively muted. Evidently the commonly accepted view of the statutory exemption of cooperatives was that it did not permit much, if any, transportation of non-member freight.[4]

In 1965, however, this conception of the limitations of the exemption was radically altered by the decision of the Court of Appeals for the Ninth Circuit in *Northwest Agricultural Cooperative Ass'n* v. *Interstate Commerce Commission*, 350 F.2d 252, *cert. denied*, 382 U.S. 1011 (1966). That suit was brought by the Commission to restrict cooperatives to the transportation of freight for their members. The court, however, held that cooperatives could, without losing their exemption, transport the freight of nonmembers as long as that transportation was "incidental and necessary" to the cooperatives' primary purpose of serving their members, 350 F.2d, at 257.

This decision "stimulated the transportation of nonfarm related traffic by exempt agricultural cooperatives for nonmembers." Examiner's Report, *United Agricultural Transportation Association of America Marketing Co-op—Common Carrier Application* (MC-133250, Sub No. 2), p. 3. And at "about the same time, the Department of Defense . . . adopted a policy of using exempt cooperatives in order to obtain effective transportation at the lowest cost" (*ibid.*).

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[3] The Government is one of the few shippers in whose favor the regulated carriers may discriminate in rates. 49 U.S.C. 22.

[4] The exemption was provided by 49 U.S.C. 303(b)(5), which excluded from regulation "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act . . . or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined, . . ."

The consequent surge of non-member, and in particular Government, carriage by the cooperatives is illustrated by the growth of AFL Government business. Thus, in fiscal 1966 AFL carried no such traffic at all; in 1967 it grossed $1,284,594.94 from that traffic; in 1968 it grossed $4,449,478.39; and in the first six months of 1969 it grossed almost as much as in all of 1968—$4,040,633.80. (A. 412a.)

To the regulated carriers, and particularly to those which derive a large part of their revenue from Government traffic, these inroads by carriers they considered unfairly advantaged posed a most serious threat. Their options were two: First, at a minimum to hold the exempt carriers to the "necessary and incidental" standards adopted by the Court of Appeals in *Northwest Agricultural Cooperative Ass'n;* and second, to urge upon the Congress remedial legislation. They pursued both courses; and—we note this because AFL does not (Br. pp. 5-6)—their efforts were supported by the Commission.

3. *Litigation against AFL.* Thus, with respect to AFL, a number of regulated carriers brought suit in the United States District Court for the Western District of Oklahoma alleging widespread transgressions of the law by AFL in its transportation of Government freight. The Commission intervened in support of the regulated carriers. The court held in favor of the plaintiffs and entered three permanent injunctions against AFL. Those injunctions—as AFL fails to mention (Br. p. 6)—were subsequently affirmed by the Court of Appeals for the Tenth Circuit. *Munitions Carriers Conference, Inc.* v. *American Farm Lines,* 415 F.2d 747 (1969).

These injunctions did not, however, halt AFL's illegal operations. Accordingly, the regulated carriers, joined by the Commission, moved the district court to hold AFL and its manager in contempt. That court, after a hearing, found

that AFL had "completely and deliberately ignor[ed]" one of the injunctions; that its actions were "demonstrative of the general devotion of defendants to their government traffic and their preferential handling of such over the traffic of their own members"; and that, in sum, AFL and its manager were "in contemptuous violation" of the court's order. The court, accordingly, levied a fine of over $74,000 against the defendants. Order of July 24, 1969, in *Munitions Carriers Conference, Inc.* v. *American Farm Lines* (Civ. No. 68-148).

4. *The 1968 legislation.* It was this sort of abuse of the "necessary and incidental" principle, together with the threat that the burgeoning non-member traffic of cooperatives posed to the economic stability of the regulated carriers, that led the Congress in 1968, with the endorsement of the Commission, to amend the cooperative exemption provision. The Senate Committee noted that the *Northwest Agricultural Cooperative Ass'n* decision "and the publicity attendant thereto has, as a practical matter, been construed by some cooperatives as an invitation to substantially expand their hauling of non-farm-related traffic for nonfarm members, and by certain groups and organizations as a device to institute unlawful transportation activities." Senate Report No. 1152, 90th Cong., 2d Sess., p. 6. It continued:

> "The relative decline of the Nation's common carrier system in recent years is a matter of serious concern. Several traffic studies reveal that common carriers have lost considerable traffic which they formerly handled and, at the same time, have been unable to share proportionately in the additional traffic generated by the Nation's expanding economy.
>
> "This decline is essentially a result of the growth of unregulated private and exempt carriage. But it is also attributable in part to the growth of unauthorized

and illegal carriage. Such illegal operators are inimical to the public interest, and if left unchecked, could ultimately undermine the common carrier system." *Id.*, at p. 2.

Under the 1968 legislation, the *Northwest* "necessary and incidental" restriction upon the transportation by cooperatives of non-members' traffic was explicitly incorporated into the statute, and in addition such transportation for non-members was limited to no more than 15 per cent of a cooperative's total interstate transportation in any year. 49 U.S.C. 303(b) as amended, P.L. 90-433, 82 Stat. 448. Regulations of the Interstate Commerce Commission implementing the amendment became effective July 7, 1969. 108 M.C.C. 799.[5]

5. *AFL's applications to the Commission.* With its illegal operations proscribed by federal court injunction, and sensing the imminence of the July 1968 legislation (AFL Br. p. 7), AFL in May of 1968 filed the application for temporary authority that is the subject of this litigation (A. 10a). The application was filed under Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a), which authorizes the Commission to grant temporary operating authority "without hearings or other proceedings" where the authority relates to a "service for which there is an immediate and urgent need" and where there is "no carrier service capable of meeting such need." The application for temporary authority was followed two months later, in July of 1968, by an application for permanent authority, which is now pending before the Commission.

The rights sought by these applications were sweeping in terms of commodities, routes, and geography. Thus, AFL

[5] In our view the statute became effective on the date of enactment, not on the date of the regulation. That question, however, is not involved in this appeal.

requested both temporary and permanent authority for the movement for the Government of general commodities, including Class A and B explosives, over irregular routes and between all points in a nine-state middlewestern and southern region, on the one hand, and a five state western region, on the other.[6]

While the application for temporary authority related to the transportation of general commodities for all branches of the Government, the only statement that was filed in support of the application was that of the Department of Defense ("DOD"). That statement, dated May 15, 1968, characterized AFL's service as "extremely desirable" because the "services of this company have afforded the Department of Defense a meaningful measure, under practical conditions, of carrier capability in general" (A. 14a). DOD did not assert, however, that existing service was inadequate —or, in the words of the statute, that there was "no carrier service capable of meeting [its] need."

Within two weeks prior to the date of this supporting statement, DOD had dispatched two letters in which, in substance, it took the position that it could not say that an application by AFL would meet the statutory tests. The earlier of the two letters, dated April 30, 1968 and addressed to AFL, praised AFL's service, but said that while DOD

[6] AFL evidently believes that, if it secures such temporary or permanent authority, it will be able to operate as an exempt carrier and at the same time to carry Government freight without regard to the section 303(b)(5) limitation of non-member traffic to that which is "incidental and necessary" to the transportation of member traffic and in any event to no more than 15% of member traffic. We do not agree. As Section 303(b)(5) is worded, it is plain that Congress did not contemplate such a hybrid operation, partly exempt and partly regulated. Our view has recently been accepted in an examiner's report in *United Agricultural Transportation Association of America Marketing Co-op—Common Carrier Application* (MC-133250, Sub No. 2). Accordingly, if AFL's application for permanent authority is granted—or should this Court reverse the lower court's judgment respecting temporary authority—AFL will have to choose between regulated and exempt status as to all of its traffic.

"would like to retain this transportation source" it was "not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (A. 11a-12a). The second letter, dated ten days later, and only five days before its letter supporting AFL's application, was a response by DOD to a letter from one of the appellees about the application. DOD stated that the Office of the Judge Advocate General of the Army had advised AFL of DOD's position, which was that, while AFL's service had been "satisfactory, fast, and economical" and while DOD "would like to retain this transportation source," DOD "is not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (A. 13a).[7]

In sum, in support of AFL's application for authority to

[7] At about this point occurred what AFL darkly describes as American Trucking Association's attempt "to bring pressure on the Department to withdraw its support of AFL's application by going directly to the Secretary of Defense" (Br. p. 7 n. 8). That "pressure" consisted simply of a letter asking DOD to withdraw its support of AFL's application and to return to the position it had originally taken, as DOD's response discloses (A. 139a). Until reading AFL's brief, it had never occurred to us that anyone would consider such communication with a shipper as blameworthy. Nor, it seems, does AFL apply the same standards to itself as it does to its opponents, for the record establishes that AFL sent DOD at least one letter designed to enlist DOD's support (A. 11a). Indeed, unless AFL now represents it to be so, we are not disposed to assume that DOD's later repudiation of the position it had twice set to paper respecting the adequacy of existing service, and its still later introduction of additional evidence in support of AFL, was untouched by any intercourse between AFL and DOD.

Since, in its description of American Trucking Associations' correspondence with DOD, AFL quotes only part of DOD's response (Br. p. 7 n. 8), we set forth the singularly unenlightening passage in which DOD attempts to explain why its change of position was not a change of position:

> "With regard to the reference made in your letter to a communication from the Military Traffic Management and Terminal Service (MTMTS) in which it was stated that the DoD 'is not in a position to state that there would be insufficient or inadequate service without American Farm Lines,' we would point out that military logistics operations have to be carried on within the capabilities of resources and services available at any given time. Thus, our operations today are structured within the parameters of today's capabilities. To be

transport general commodities for the Government in a 14 state region, the record in its initial state contained a statement from only one department of the Government that did not assert the inadequacy of existing services, as well as two letters in which that department conceded that it was "not in a position" to make such an assertion, even though in all three documents the department expressed a desire to retain AFL's service.

Eighty protests to the application were filed on behalf of well over 100 motor and rail carriers. Each protestant asserted that it could provide some part of the service in question. Many of the protestants also challenged DOD's statements as not complying with the governing Commission regulations, said that they could not respond to the statement's generalities except with generalities, and asserted that DOD had never complained to them that their service had been inadequate (*e.g.*, A. 16a-138a).

6. *Commission proceedings prior to litigation.* The Commission's Temporary Authorities Board, on July 12, 1968, denied the application on the ground that the "applicant has not established that there exists an immediate and urgent need for any of the service proposed" (A. 141a-142a). However, AFL petitioned for reconsideration; and on September 3, 1968, Division 1, without explaining the basis for its disagreement with the Board, granted the temporary authority (143a-144a).[8]

Some of the protestants filed petitions for reconsideration

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satisfied, however, with today's capabilities and not to seek improvements in transportation services would, in our judgment be turning our back on progress, and not in keeping with our responsibilities to the Armed Forces and to the taxpayer.

"In summary, we do not consider that support of American Farm Lines' application for temporary authority is a reversal of DoD policy . . ." (A. 140a-41a).

[8] It has been held in like circumstances that the failure of the appellate division to set forth with reasonable specificity the grounds for its action invalidates the order. *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411 (D.Tex. 1956), *vacated as moot*, 352 U.S. 1028 (1957).

and motions to stay the order. The Commission, however, denied the motions to stay (A. 146a-148a), and the order became effective on September 16, 1968.

7. *Institution of the litigation.* Since the Commission had denied the motions to stay its order, a number of protestants, including all appellees in this Court, brought suit to set aside the order in the United States District Court for the Western District of Washington and moved for a temporary restraining order (*e.g.*, A. 149a). On October 2, 1968, Judge Boldt granted the motion (A. 166a) after a hearing during which he stated:

> ". . . [T]he . . . rules implementing the statute . . . specifically requires that there shall be supporting statements for these applications and that each one must at least specify what efforts have been made to procure the desired service . . . and to specify in particular names, addresses, when, where, and all the rest of it, all of it in great detail. I don't see anything like that in here" (A. 164a-165a).

8. *Reopening of the Commission proceeding.* After the district court had stayed the temporary authority order, the Commission reopened the proceeding for the taking of additional evidence. It did not do so by way of acting upon the pending petitions for reconsideration filed by some of the protestants. Rather, it did so because of a submission that had been filed by DOD. Thus, in a reply to the protestants' petitions for reconsideration—a reply filed two weeks after the district court's restraining order—DOD advanced additional factual claims in support of AFL's application (A. 170a, 391a). The day after that reply, AFL filed a petition that the proceeding be reopened (A. 391a). The Commission thereupon reopened the proceeding "on [its] own motion for the purpose of receiving a verified statement from the Department of Defense" that, the Commission directed,

should "specify the commodities and points between which there is an immediate and urgent need for applicant's proposed service which cannot be met by existing carriers. . . ." (A. 170a-171a). To assure the protestants an "opportunity to reply" to this new evidence, the Commission invited the submission of verified statements in rebuttal.

The Commission did not secure the permission of the District Court to reopen the proceeding. *After* it had entered its order reopening the proceeding, the Commission filed a motion in the district court seeking a stay pending the outcome of the reopened proceeding (A. 167a). Plaintiffs opposed on the ground that "the Commission was not authorized to reopen the proceeding because . . . [the] court had taken jurisdiction of the matter" (A. 391a). But this motion was never noticed by Commission counsel for hearing, and therefore it was never acted upon (A. 392a). A number of protestants also petitioned the Commission to vacate its order of reopening on the ground that "the Court having taken jurisdiction of this matter, the Commission was without power to re-open the proceeding" (A. 177a; 299a, 308a, 315a, 392a). Those petitions were never ruled upon specifically, but presumably were denied in the Commission's final order (A. 367a).

Upon the reopening, AFL submitted a supplemental DOD statement. Since the central legal issue in this case is whether that statement conformed to the Commission's regulations, we postpone to our argument a description of the statement.

The protesting carriers objected again that the DOD statement failed to comply with the regulations and that its claims of service inadequacies were so general that responses could be framed for the most part only in like generalities. However, within the limitations imposed by the vagueness of the DOD statement, protestants adduced a considerable body of additional evidence which may be

summarized as follows: First, between many of the points and as to many of the commodities in question, existing carriers did provide single-line, direct route, and/or two-man driver team service—that is, the type of service DOD said it wanted to continue receiving from AFL. Second, even where that was not the case, existing carriers provided a wholly adequate service. In that connection, protestants asserted that single-line, direct route service using team drivers is not necessarily superior to joint-line, regular route, single driver service, but that rather the quality of service depends upon the practices of the carriers involved. And, while disabled from rebutting with particularity the general DOD assertions respecting service deficiencies, protestants did assert that their records showed no failure to deliver DOD traffic on time and no complaints by DOD (A. 210a-363a).

Notwithstanding the district court's preliminary determination that the original DOD statement had not complied with the Commission's regulations, and despite the renewal of that claim by protestants respecting DOD's second statement, the Commission, on December 19, 1968, again granted the application of AFL without even mentioning the issue (A. 367a). The protestants for the second time went to court (A. 371a).

9. *Further judicial proceedings.* On January 6, 1969, Judge Boldt temporarily stayed the Commission's second order, noting that the Commission had reopened the proceeding "concerning matters then within the jurisdiction of . . . [the] court without applying for modification of the restraining order, notifying . . . [the] court or otherwise noting the fact that this court had and has jurisdiction of the review . . ." (A. 382a-383a). The three-judge court entered its final judgment on March 26, 1969, holding the orders void (A. 400a). The court's opinion set forth two alternative grounds: (1) the Commission failed to enforce the require-

ments of its regulations governing applications for temporary authority, specifically the requirements of subparagraphs 8 and 9 of 49 C.F.R. § 1131.2(c); and (2) the Commission had no authority without leave of the court to reopen its proceedings in order to take new evidence and to issue a new order based upon that evidence (A. 388a-399a).

The district court denied AFL's application for a stay of its judgment, but on August 21, 1969, Mr. Justice Douglas granted a stay (A. 422a).[9]

Summary of Argument

The lower court was correct in holding that the Commission's order awarding AFL temporary authority was invalid because the Commission had failed to enforce its own regulations and, alternatively, because the Commission had exceeded its authority in reopening the proceeding, taking additional evidence, and entering a new order without permission of the court.

1. The DOD statement did not substantially comply with the Commission's rules. Those rules require, *inter alia*, that the shipper supporting the application state "[w]hether efforts have been made to obtain the service" from existing carriers, and, if such efforts have been made, that the shipper provide "the dates and results of such efforts," the "[n]ames and addresses of existing carriers who have either failed or refused to provide the service," and the "reasons given for any such failure or refusal." 49 C.F.R. 1131.2(c)(8),(9). The Solicitor General (a) says

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[9] While it is a matter of little consequence, for the sake of accuracy we note that AFL is wrong in referring to what DOD said "in supporting AFL's stay application" insofar as AFL implies that DOD supported the application in this Court (Br. p. 14). In fact, while DOD supported the application in the lower court, it filed nothing in support of the application in this Court.

that DOD claimed it had made such efforts to obtain the service it desired and that those efforts were unsuccessful; (b) concedes that DOD did not provide data such as the dates of such efforts or the names and addresses of the allegedly defaulting carriers; but (c) says that these defaults were immaterial. But the defaults *were* material. The DOD statement, insofar as it related to the alleged failure of existing carriers to provide the desired service, consisted almost exclusively of a series of generalizations that were invariably so qualified that the force of the statements could not be gauged absent the sort of details required by the regulations. Had those details been provided, the "many, many instances," and the "in some cases," and the "sometimes," and the "some" might have turned out to refer to a relatively insignificant handful of defaults by existing carriers. Moreover, armed with the specific details required by the regulations, the protestants might have explained the alleged defaults to the satisfaction of the Commission. But without compliance by DOD with the regulations, the protestants' right to file rebuttal statements under the regulations (49 C.F.R. 1131.3(a)(1),(2)) was seriously undermined.

2. In such circumstances, the principle established by this Court in *Service* v. *Dulles,* 354 U.S. 363 (1957), and like cases is applicable. The Commission's rules are stated in mandatory terms; they are designed to provide a sound factual basis for adjudication by the Commission and accordingly to increase the chances of a fair determination by the Commission; they were concededly not complied with in several respects; the defaults were material in that compliance might have changed the outcome of the proceeding; and the economic consequences to the protestants were substantial, inasmuch as grants of temporary authority extend over long periods of time—surely two to three years in this particular proceeding. As in cases like *Service,* the

Commission was not obliged to adopt these regulations; but having adopted them it is bound by them.

3. AFL's approach to the case is not only incompatible with the Solicitor General's but is if anything even less meritorious. As we have noted, the Solicitor General agrees with appellees that DOD did indicate in its statement that it had made efforts to secure the service it wanted from other carriers and that hence, at least under a "literal" reading of the regulations, it was bound to provide the specified details as to these efforts. AFL, in contrast, attempts to avoid the problem entirely by asserting that DOD did not in fact make any such efforts and that accordingly it was not required by the regulations to provide details respecting efforts that it had not made. First, that is not what the DOD statement said. Second, the Commission in its order found that DOD "has attempted but has been unable to obtain the required and necessary type of service" (A. 368a). Counsel cannot substitute their views for that of the Commission. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962). Third, had DOD admitted in its statement that it had not tried to obtain the service it wanted from existing certificated carriers, AFL's application would have failed because of want of proof of the statutory requirement that existing carriers must be unable to provide the service. 49 U.S.C. 310a(a). In such circumstances, DOD's plea would have rested primarily, if not exclusively, upon its claim that it needed single-line service between all of the points involved; but the Commission's regulations provide that "[g]enerally the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority," and that such a grant will be made "only when it is clearly established" that the existing carriers cannot do the job. 49 C.F.R. 1131.4(b)(4).

4. The alternative ground for the lower court decision—

that the Commission's order should be set aside because the Commission reopened the proceeding without permission of the court—is also correct. It has long been established as the general rule that "[w]hile a case is in court the court's jurisdiction is said to be exclusive. The agency cannot act upon its order while the 'case' is 'in the court.'" Jaffe, *Judicial Control of Administrative Action* 709 (1965). This principle, which is closely related to the bar against action by a trial court while a case is on appeal, is "inherent in the nature of judicial review" (Gov't Br. p. 26) and accordingly applies to the Interstate Commerce Commission as well as to other agencies. *Inland Steel Co.* v. *United States*, 306 U.S. 153, 160 (1939); *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 231 F. Supp. 422 (D. Ill. 1964). Moreover, appellants' argument that an exception should be made in this case because some appellees had filed petitions for reconsideration that were pending when the court assumed jurisdiction is not well taken. First, those petitions were not authorized under the Commission's rules. Second, even if they had been the result should not be different, for otherwise one of the major purposes of the rule restricting agency authority would be frustrated. That purpose is to insure, by way of judicial control, that the agency in reopening the record is not simply acting as a litigant attempting to shore up its position in court, but rather is acting as an impartial adjudicatory agency. See *Atchison, Topeka and Santa Fe Railway Co.* v. *United States, supra.* That danger is no less present where petitions for reconsideration are pending when the court temporarily enjoins an agency order than where there are no such petitions. The facts of this case, indeed, are suggestive in this regard. The Commission did not reopen the record by way of granting the petitions for reconsideration. It acted on its own motion. It did not, moreover, meet the district court's concern by demanding compliance with its regulations. Rather,

it simply accepted additional evidence from DOD and then argued in court that because of this additional evidence its order should be sustained.

Argument

As to the first issue in this case—that relating to the Commission's regulations governing applications for temporary authority—the central questions are whether DOD's statement in support of AFL's application complied with those regulations and whether, if it did not, appellees were prejudiced in such fashion as to undermine the validity of the Commission's order. Accordingly, we will begin our argument with those issues and will then discuss a further question pressed by AFL—though not by the Solicitor General—namely, whether prejudicial non-compliance with the regulations can be disregarded on the ground that the regulations do not vest any rights in the parties opposing the application. In the final portion of our brief, we discuss the alternative basis for the district court's decision—the holding that the Commission's second order was invalid because it was the product of the Commission's action in reopening the proceeding after the institution of litigation and without authorization by the court.[10]

I

The Commission's Order was Properly set Aside By the Lower Court Because There Was Not Reasonable Compliance With the Commission's Regulations, Because Appellees Were Prejudiced Thereby, and Because the Regulations Were Binding upon the Commission.

Because of the terms in which appellants repeatedly characterize the contending positions with respect to the com-

[10] There is no dispute as to the lower court's judgment insofar as it set aside the Commission's first order. See Government Brief, page 3 note 4 and A. 385a.

pliance with regulations issue, we state at the outset what we conceive to be the governing principle and what we propose to establish in light of that principle. It is fair comment, of course, for appellants to urge that the lower court's decision, and our arguments, depend upon a "literal," or "rigid," or "hypertechnical," interpretation of the Commission's regulations rather than a "reasonable" interpretation. (See Gov't Br. pp. 13, 18; AFL Br. pp. 15, 19, 20, 21, 29.) Appellants are not accurate, however, when they also cast the question presented in terms of whether the rule should be one of "literal," as against "reasonable" or "substantial," compliance (Gov't Br. p. 3; AFL Br. p. 3). So far as we are concerned, the established requirement is simply that there be reasonable or substantial compliance with an agency's rules.[11] We intend to show that, measured by that requirement, the Commission's action is insupportable. Moreover, there is no basis for suggesting that the district court's view was that literal, as against reasonable, compliance was necessary. Such a view would have been at odds with a prior opinion of the same court, written by the same author, and involving the same regulations, which phrased the rule in terms of "enforcement of reasonable compliance." *Acme Cartage Co.* v. *United States,* 290 F. Supp. 453, 457 (1968). We begin, then, with the question whether there was in fact substantial compliance with the Commission's regulations.

A. *DOD's Statement Did Not Substantially Comply With The Commision's Regulations.*

1. *The purpose and content of the regulations.* There is nothing obscure about either the purpose or the meaning of

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[11] See, *e.g., Mendelson* v. *Macy,* 356 F.2d 796, 801 (D.C. Cir. 1966); *Sangamon Valley Television Corp.* v. *United States,* 269 F.2d 221, 224 (D.C. Cir. 1959).

the Commission's regulations here in question. Those regulations, which relate to the statements supplied by shippers in support of applications for temporary authority, are part of the rules promulgated in 1965 "to implement" the temporary authority statute. 49 C.F.R. 1131.1(a). The regulations divided applications for temporary authority into two types. In the first—referred to as applications for "emergency temporary authority"—there exists an "emergency" so "immediate and urgent" that there is not "sufficient time to afford . . . notice" to prospective protestants. 49 C.F.R. 1131.2(d), 1131.4(b)(3). In such circumstances, the regulations provide for truncated procedures that permit immediate action by the Commission.[12] But where such an emergency does not exist—as in the case at bar—the regulations provide for a limited adversarial proceeding based upon written evidence and argument. Thus, the regulations specify what the applicant must file, require that notice be published, and provide that "interested persons who can and will provide all or any part of the proposed service" be accorded the opportunity to file written protests. 49 C.F.R. 1131.3(a)(1),(2).

Apart from the rules respecting notice and an opportunity to be heard, the rest of the regulations are designed in the main either to establish substantive standards against which applications will be measured—such as that "[g]enerally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority," 49 C.F.R. 1131.4(b)(4)—or to insure the disclosure of information relevant to the statutory standards.

The regulations directly involved in the case at bar fall in the latter category. They provide that each application

[12] Examples of such emergencies provided in the regulations are a need "to prevent a plant shutdown, to move particular shipments in the interest of the national defense, to meet needs resulting from fires, floods, storms, or other disasters which affect the public health, safety, and welfare, disruption

"must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers"—the statutory tests—and that "[a]ny such supporting statement must contain at least" eleven items of particularized information bearing upon the immediacy and urgency of the need and the unavailability of service from existing carriers. 49 C.F.R. 1131.2(c).

Among the rules describing those eleven categories of information are the rules here at issue. Under subparagraphs 8 and 9, the supporting shipper "must" state:

> "(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> "(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal."

The central question is whether DOD's statement of November 20, 1968 substantially complied with these subparagraphs.[18]

2. *The inconsistent approaches of AFL and the Solicitor General to the DOD statement.* Appellants join in saying that the DOD statement complied with subparagraphs (8) and (9); but they base their arguments upon quite different, and quite inconsistent, reasons. Indeed, the clash between the appellants in this respect suggests the grave difficulties

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in existing carrier services by work stoppages, unexpected cessation of existing transportation service, lack of equipment capable of transporting the involved commodity, failure or lack of storage facilities and imminent spoilage of perishable commodities. . . ." 49 C.F.R. 1131.4(b)(3).

[18] Appellees claimed in the district court that the statement did not comply with other subparagraphs as well. The court did not reach those claims. Since the most obvious and prejudicial defaults related to subparagraphs 8 and 9, we confine our argument in this Court to those provisions, leaving to other appellees discussion of additional subparagraphs.

involved in any argument that DOD's statement met the requirements of the regulations.

AFL takes the position that DOD's "response to the requirements of subparagraphs (8) and (9)" was simply that "it had *not* requested the service from other carriers . . ." (Br. p. 22) (emphasis supplied). Having responded in this fashion, DOD was not required to supply "the dates and results of such efforts" or the "names and addresses of existing carriers who have either failed or refused to provide the service" or "the reasons given" by such carriers. Since no attempts to secure service had been made by DOD, no details respecting such attempts need or could be supplied. Nor was DOD in default for not seeking the service from existing carriers, because

> "neither subparagraphs (8) and (9), nor anything else in the Interstate Commerce Act or the ICC's regulations, require a shipper supporting such an application to *make* efforts to obtain the proposed service from others. The regulations simply call for a disclosure whether such efforts have been made. If they have been made the shipper is asked to describe the results of its efforts." (Br. p. 20.)

The Solicitor General, however, takes an entirely different view of the DOD statement. He says that "DOD *did* state whether it had made efforts to obtain the service from existing carriers, and graphically described the results of its efforts . . ." (Br. p. 16) (emphasis supplied). The Solicitor General devotes his efforts to demonstrating, not that such a "graphic description" was unnecessary because DOD had not sought service from existing carriers, but that the description satisfied all but "the most finicky notion of what constitutes reasonable compliance with the rules" (Br. pp. 16-17).

Of these two conflicting views as to whether DOD said it had, or had not, made efforts to obtain the desired service from carriers other than AFL, only the Solicitor General's is sustainable by reference to DOD's statement and to the Commission's order. We deal with the statement in a moment. As to the order, the passage quoted by the Solicitor General (Br. p. 10) shows that the Commission acted on the view that DOD *had* in fact made efforts to obtain the service it wanted from existing carriers, not, as AFL would have it, on the view that DOD had not made such efforts. The Commission's finding in this respect is quite clear:

> "(3) That . . . [DOD] has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs" (A. 368A).

Whatever the merits of AFL's argument might otherwise be, therefore—and we show later that it is in any event meritless—AFL's effort to avoid the burden of showing that DOD supplied sufficient data respecting its efforts to secure adequate service must fail. The validity of the Commission's order must be tested by what the Commission said, not by counsel's *"post hoc* rationalizations." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962); see also, *e.g.*, *Securities and Exchange Commissio* v. *Chenery Corp.*, 318 U.S. 80 (1943); *Zuber* v. *Allen*, — U. S. —, — (38 U.S. L.Wk. 4040, 4049) (1969).

3. *The deficiencies of DOD's statement and the consequent prejudice to appellees.* The key issue in this case, in our view, is whether the Solicitor General is right or wrong in contending that the DOD statement substantially complied with the regulations. The only way to settle that issue is, of course, to measure the DOD statement by the requirements of the regulations. In this case the outcome of that analysis depends upon the degree of tolerance permitted by the standard of "reasonableness" or, to phrase

it differently, by the standard of the "substantiality" or "materiality" of any deficiencies. For the Solicitor General does not claim that the regulations were in all respects honored. He concedes defaults, but argues that they were not fatal. And for our part we do not contend that every default is fatal, but only those which are substantial.

The content of these norms of "reasonableness," or "substantiality," or "materiality," depends upon the view one takes of the purposes of the regulations. The Solicitor General allows that the DOD statement was deficient in that it did not provide the dates of alleged service defaults and the names of the defaulting carriers, but says "these are the only deficiencies," and that "their absence can offend only the most finicky notion of what constitutes reasonable compliance with the rules" (Br. p. 17). But why is that so? Why should DOD's statement, with these acknowledged deficiencies, be considered to have substantially complied with the rules? That conclusion can be justified only if the defects of the DOD statement did not subvert the purpose of the rules.

Our view of the purpose of the rules is this: The rules on their face indicate that they were designed to elicit information relevant to the statutory standards of an "immediate and urgent need" for service that "no carriers [are] capable of meeting" (*supra*, p. 20). To that end, the Commission by these rules said in effect that generalizations about the inability of existing carriers to provide the service are not enough. Rather, the shippers must describe in detail what happened when they attempted to secure the service. They are required not merely to state the "results" of their efforts—an injunction that might be loosely read—but also to give the names of the allegedly offending carriers, the dates of the shipper's unsuccessful efforts, and the reasons asigned by the carriers for their inability to

perform. Those requirements for details enable the Commission to test general assertions by the number and quality of specific examples. Moreover, since the rules also provide for the filing of protests, these requirements become even more significant, for they permit particularized rebuttals by the allegedly inadequate carriers rather than general disclaimers.

On this view of the purpose of the regulations, the standard by which to judge the materiality of an omission is whether, had the missing details been provided, the case for an "immediate and urgent need" that existing carriers are not "capable of meeting" might have seemed significantly less compelling. And this test of materiality is at the same time the traditional test of prejudice—had there been compliance, might the Commission have denied the application. But if this is the standard against which the DOD statement is to be measured, then, as we will demonstrate, there can be no doubt that the DOD statement not only failed to comply with the literal requirements of the regulations, but fell far short of reasonable compliance.

Before discussing the contents of the DOD statement, we state our points of agreement and disagreement with the Solicitor General as to DOD's compliance with the terms of the regulations. First, the Solicitor General, as noted above, says that DOD answered in the affirmative the question put by subparagraph 8 as to "[w]hether efforts have been made to obtain the service" desired. The Solicitor General, we think, is correct. The DOD statement made quite clear that it had had vast experience with existing carriers in the territories involved, that it had attempted to secure from them transportation that would meet its "need for speed," but that the need "has not been met in many, many instances by the current certified motor carriers" (A. 198a). Thus the statement supports the Com-

mission's finding that DOD "has attempted . . . to obtain the required and necessary type of service" (A. 368a).

Since DOD represented that it had made efforts to obtain the desired service, the balance of the requirements of subparagraphs 8 and 9 came into play. All of them in one form or another oblige the shipper to provide details as to his allegedly unsuccessful efforts. Taken together, they call for the "results of such efforts," the "dates of such efforts," the "names and addresses" of the carriers who "either failed or refused to provide the service," and "the reasons given for any such failure or refusal."

The Solicitor General concedes that DOD did not supply either names, addresses, or dates, but says that it did describe the results of its efforts and the reasons for the defaults (Br. pp. 16-17). The Solicitor General is incorrect with respect to the provision of reasons. The regulation requires a statement of "the reasons given for any such failure or refusal"—that is, the reasons given by the carrier who allegedly failed to perform. Nothing of that sort appears in the DOD statement. When the Solicitor General says that DOD "explained in detail the reasons why existing carriers were unable to provide the service needed," he refers to the reasons that *DOD thought* accounted for the alleged service failures. That is not what the regulations ask for. Nor do we agree that DOD sufficiently described the "results" of its efforts; but whether or not it did is immaterial, since as we now show the other deficiencies in the statement are quite enough to require a decision that there was not substantial compliance.

The DOD statement is long and carefully composed. It repeatedly stresses the importance of the defense mission of the Department, and it provides a certain amount of detail on a variety of topics. But if the statement is read with an eye toward the question of compliance with sub-

paragraphs 8 and 9, skillful draftsmanship cannot obscure the almost total want of specificity respecting DOD's allegedly unsatisfactory experience with existing carriers in circumstances where, had there been such specificity, the force of DOD's general claims might well have been markedly diminished. The five portions of the statement relevant to this element of DOD's showing—its allegedly unsatisfactory efforts to obtain sufficiently speedy service—may be summarized as follows:

a. In seeking to explain why there is an "immediate and urgent need" for granting AFL authority to transport all types of commodities between all points in a 14 state region, DOD begins with the undoubtedly correct statement that it "must effect movement of a vast quantity of a multitude of different commodities between different points," and that "a substantial percentage of its total transportation requirement" is for such movement in the region in question (A. 194a-197a). But DOD does not, nor could it reasonably, claim that all of this freight—which includes such items as salvage, surplus equipment returned from overseas, and canned fruits and vegetables (A. 198a)—must be moved with all possible speed. Rather, DOD says that "[a] part of" this traffic "requires that it be transported . . . in the most expeditious manner possible" (A. 198a). DOD does not say which "part," or between which points. More importantly, even as to that "part," DOD does not say that it is never, or even that it is not often, carried with such expedition. Rather, DOD says simply that "in many, many instances" this "need for speed has not been met by the current certified motor carriers . . ." (A. 198a).

Given the "vast quantity" of commodities shipped in "tremendous volume" between "innumerable points" for DOD (A. 195a, 198a), the assertion that in "many, many" instances the speed of delivery was unsatisfactory hardly

provides a very precise basis for measuring the degree of seriousness of the problem. Accordingly, one must look to the balance of the statement for specification.

The statement, however, follows this assertion respecting the "many, many" instances of default, not with the description of any of those instances that is required by the regulations, but with three alleged reasons for the deficiencies of carriers other than AFL. The first reason is one particularly emphasized by AFL's brief. As AFL describes it, DOD on the basis of its experience with joint as against single-line service *"viewed AFL's service as three times faster than that available from other carriers"* (Br. p. 22, see also Br. p. 37) (emphasis AFL's). That is, to put it very conservatively, an overstatement. What DOD actually said was that a "majority" of available service is joint-line, and that "experience has shown" that as to such service DOD must "*in some cases*" allow 24 hours for each 300 miles, whereas single-line service over direct routes with two-man driving teams "generally" takes only 8 hours for each 300 miles (A. 198a-199a) (emphasis supplied). Apart from the ambiguities in the assertion that a "majority" of available service is joint-line and that "generally" single-line service is faster, the sponginess of a declaration that "in some cases" joint-line carriers can move traffic at a speed of only 300 miles a day is evident.

Next, DOD states that "virtually all" existing carriers move over regular routes, which are "often" circuitous (A. 199a). But DOD does not say how "often" is often, or how "circuitous" is circuitous, or how often and to what extent this factor has delayed the transportation of what kinds of commodities between what points by what carriers.

The next assertion is much the same. DOD says that "some" regular route carriers use single drivers rather than two-man teams, which "sometimes" causes delays

because of the resulting substitution of drivers and power units during the movement. DOD does not say how often, how much delay, how many carriers are involved, who they are, or which points are affected (A. 199a).

As to each of these assertions respecting DOD's unsuccessful efforts to obtain swift service, then, the provision of the details required by the regulations—a description of particular incidents with names, dates, and the carrier's assigned reasons for delay—might well have deflated DOD's claims. "Some" might have turned out to be but a handful; the delays even on those "sometime" occasions might have been, by and large, slight; only one or a few carriers operating between but a few points might have been responsible for any significant delays; or many of the significant delays might have been due to factors such as weather or the failure of DOD to specify desired delivery times.

b. The next portion of the statement is evidently designed to supply detailed evidence to support the preceding general assertions respecting the overall inadequacy of existing service (A. 200a). But *only three* examples are given, and as to those little detail is given—certainly not the detail required by the regulations. Thus, for its first example DOD asserts that "some" shipments of explosives between two given points by joint-line service require 6 to 11 day delivery as against "third morning" delivery by an existing single-line carrier. But DOD again does not indicate how many is "some"; it does not name the carriers or the dates of the alleged failures; nor does it suggest why in any event its needs cannot be met by the existing single-line carrier. Next, as to shipments from St. Louis to points in California, DOD asserts that " 'transit times' that could be afforded by carriers holding 'single line' authority for operation over irregular routes would be little more than half that now experienced through use of 'regular route' carriers." But

the only element of this statement that is specific is the points of origin and destination. One presumes that this estimate is based upon facts—DOD's actual experience with existing carriers. Those facts are not disclosed. That also is the case with respect to DOD's last example, a similar comparison of existing joint-line and single-line transportation of shell cases between two points. And here again DOD does not indicate why, if it prefers single-line service, the existing single-line carriers cannot serve its needs.

But not only are these examples in themselves deficient because of a want of the specificity required by the regulations. Just as important is the consideration that, even had sufficient data been supplied as to these examples, it could not in reason be maintained that specificity as to these few instances would adequately support DOD's sweeping generalizations about the overall service available to it respecting the transportation of all commodities between all points in the multi-state area involved.

c. The DOD statement next identifies several special problems that allegedly are not solved through the use of existing carriers (A. 204a-205a). First, in "many" instances it is necessary to coordinate the arrival of inbound shipments with the production schedules of manufacturing installations. But here again *only two* examples are given in support of the conclusion that this is a problem that arises "many" times; *only one* example is given to show that the use of existing carriers is not adequate to solve the problem; and even with respect to that example the statement does not identify the carriers that allegedly have performed unsatisfactorily. What if it turned out upon compliance with the name-date-occasion requirements of the regulations that this was the only, or one of but a few, situations in which the problem arises? That this is not a far-fetched assumption is indicated by the fact that, as to these two examples,

DOD is speaking of production facilities that do not have adequate warehousing. Presumably, or at least possibly, that is not a condition that exists at many government production facilities.

DOD's next special problem is assertedly the need to secure delivery of freight in advance of ship or aircraft departure where the freight is destined overseas. DOD appears to concede that this problem can normally be taken care of by loading "at interior origin points sufficiently in advance of the scheduled transshipment date to allow for the transit times normally required by the particular carriers involved" (A. 205a). However, DOD says that it "has experienced situations" where despite such advance planning the shipments were late. *One* "concrete example" is provided, and as to that the allegedly defaulting carriers are not named and there is no indication as to how often they defaulted or what reasons they assigned for the delays.

d. The statement cites five examples of AFL's "excellent" service (A. 207a-208a). In each case, AFL was able to make delivery within the required time, whereas "based upon [DOD's] experience" no existing carrier could have met the deadline. But the carriers that allegedly could not have performed are not identified, nor is there any description of any sort respecting the "experience" upon which DOD's judgment was assertedly based.

e. Finally, DOD says that, even though existing service may be adequate for some commodities between some points, "any transportation system which is largely comprised of carriers holding 'bits and pieces' of authority . . . is inherently inefficient" (A. 200a-201a). That "bits and pieces" description, of course, accurately characterizes the entire regulated motor carrier transportation industry under the system established by the Congress as implemented by the Commission. The statement cites no instance in which

the "bits and pieces" system was responsible for service failure, nor does it undertake to support its generalization in any other way.

In short, the DOD statement is composed almost entirely of sweeping assertions, but assertions that are at the same time invariably hedged in telltale fashion—there are "many, many instances" of failure of existing carriers to meet DOD's needs for speedy service; a "majority" of available service is joint-line and "in some cases" single line service is three times faster; regular routes are "often" circuitous; "some" existing carriers use single drivers rather than two-man teams and this "sometimes" causes delays, and so on. To support these assertions, only a handful of examples are mentioned, and even as to those the regulations are not followed—there are no dates, no names, no addresses, no recitation of reasons given by the responsible carriers.

These are precisely the kind of generalizations and vague assertions that would have been penetrated by compliance with the rules; and had the necessary details been provided, a substantially different picture might well have emerged. The "many" and the "some" and the "sometimes" might turn out to be arithmetically correct descriptions of a comparatively few instances. Those might be confined to but a few carriers between but a few points as to but a few commodities. Some or most or all of those might, in addition, be explicable. That might also be the case respecting the few examples that are mentioned in the statement had the allegedly offending carriers been named and their claimed defaults been identified. It is suggestive in this respect that, insofar as DOD's statement contained allegations that were specific enough to be checked, protestants were able to cite a number of significant errors (A. 268a, 342a-343a, 348a, 308a-309a). In short, had DOD complied with the regulations, the Commission might well have con-

cluded that DOD's need was not so "immediate and urgent" after all, or that existing carriers are able to meet it, or at the least that the authority should be limited to something less than all commodities for all branches of the Government transported between all points in a 14 state region.

There was not, therefore, substantial compliance, and the other side of that coin is that the appellees were prejudiced by non-compliance. The case meets the classic definition of prejudicial error: the result might have been different had the error not been committed.

We turn now to what the appellants have to say about this. The Solicitor General takes a confession and avoidance approach. He grants that DOD did not provide many of the details required by the regulations; but he says that "it is not hard to understand why this unique shipper, with its enormous volume of varied traffic moving between multitudinous points, would find it substantially impossible to provide such intricate details" (Br. p. 17). First of all, this is really an argument that there would have been good cause for waiving the requirements of the regulations; but DOD did not suggest to the Commission, and the Commission did not find, that waiver would be appropriate. Accordingly, the argument is not available in this Court in defense of the Commission's order. *E.g., Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962); *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80 (1943); *Zuber* v. *Allen,* — U.S. —, — (38 U.S. L.Wk. 4040, 4049) (1969). Moreover, for our part we do find it "hard to understand" why the argument, had it been advanced to the Commission, would have been persuasive. The Commission has held that "[w]here necessary facts are lacking" the Government is not to be excused any more than another shipper would be. *Riss & Co., Inc., Extension—Explosives,* 64 M.C.C. 299, 328 (1955); *National Freight, Inc., Extension—Commodities In Bulk,* 84 M.C.C. 403, 407 (1961). This "unique shipper" is

presumably as well staffed with transportation officers to handle its "enormous volume" of traffic as are less unique shippers; those transportation officers doubtless have a wealth of detailed data available; presumably much of that data formed the basis for DOD's generalizations about the inadequacy of existing service; and plainly, at the very least, that data was readily at hand with respect to the "examples" described in the statement.

This is not to say that DOD was obliged to provide every last detail of alleged service failures over the years, or anything of the sort. The standard, as we have said, is *reasonable* compliance. Particularization of the alleged failures over a significant recent period, for example, would in our view suffice. But what the Solicitor General urges is that, as a matter of law, this Court take judicial notice of the correctness of an argument never advanced by DOD until now, that argument being that DOD is simply not institutionally capable of providing the data required by the regulations even over a limited period or on a random sample or any other sort of basis. To state the argument is, we suggest, to establish its infirmity.

Next, both the Solicitor General and AFL urge that appellees were not prejudiced by the Commission's failure to enforce its regulations.[14] We put AFL's arguments to the side for the moment, because they relate to prejudice in law, not prejudice in fact (Br. pp. 30-31). That is, for example, AFL maintains that there was no prejudice because the regulations do not confer any rights upon private parties, an argument we discuss later.

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[14] We assume *arguendo* that the possibility of prejudice must be shown. It was so held in *National Capital Airlines, Inc.* v. *C.A.B.*, — F.2d — (D.C. Cir., Sept. 12, 1969). Another court, however, has declined to decide this question. *Pacific Molasses Company* v. *F.T.C.*, 356 F.2d 386, 387 n. 3 (5th Cir. 1966). If, as the courts have repeatedly said, an agency's regulations have the force of law, it is not easy to see why a showing of specific prejudice should be required.

The Solicitor General, on the other hand, does state his disagreement with our position that, had the required data been provided, the outcome might have been different. But all he says on that score is that "there is no reason to believe that names, addresses and dates would have changed the weight of the evidence" (Br. p. 17). He does not say why that is so; and we have indicated in some detail why it is not so. Beyond that conclusory assertion, the Solicitor General's argument respecting prejudice simply misses the point. He says: "Given the fact that the Commission had before it the information it needed to determine whether AFL's application met the statutory requirements, it is difficult to see how the absence of names, addresses and dates prejudiced the protestants. . . . The numerous protestants introduced a great deal of evidence. . . . Their rebuttal failed to convince the Commission" (Br. p. 17). This ignores the whole theory of the prejudicial error doctrine. The fact is—and so far as we can tell the Solicitor General does not deny it—that the protestants were disabled from framing effective rebuttals by the absence of the required details in DOD's statements. Moreover, the Commission was deprived of supporting data it should have had in order to permit a more informed evaluation of DOD's claims. Had the information been supplied, the result might have been changed. Nothing the Solicitor General says detracts from that conclusion.

B. *The Binding Character of the Rules.*

If there was not substantial compliance with the rules, and if the failure to comply prejudiced appellees, the question remains whether the regulations are binding upon the Commission in such circumstances. That is, the question is whether compliance with these rules is necessary under the principle announced by this Court in *Service* v. *Dulles*, 354

U.S. 363 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Yellin* v. *United States*, 374 U.S. 109 (1963); and *Bridges* v. *Wixon*, 326 U.S. 135, 153 (1945).

Here again appellants part company. AFL argues that even if the DOD statement did not comply with the rules the Commission's action should not be set aside because the rules were not "intended for the benefit of protesting carriers" (Br. p. 26). They are, so to speak, merely housekeeping rules that the Commission can enforce or not as it chooses.

While the Solicitor General makes some tentative moves in the direction of this argument (Br. pp. 20-21), in the final analysis he draws back from it. This is the way he summarizes his position:

> "In short, the information requirements of the rule are simply an aid to the Commission in the exercise of its discretion under Section 210a(a). They confer no rights on protesting carriers and do not limit the Board's discretion. *So long as there is reasonable compliance with the rule—thus avoiding the risks that applicants may not be treated equally, or that the Commission may not get quick access to the information it needs—the purposes of Section 210a(a) are met*" (Br. p. 22).

Thus the Solicitor General turns back the inquiry to the question with which we began—reasonable compliance. And he does so for the very good reason that a holding that the Commission is free to apply or to disregard the rules runs the "risk that applicants may not be treated equally." That is, as we now demonstrate, the correct response to AFL's argument.

In the *Service* v. *Dulles* line of decisions, this Court has

established and consistently applied the important principle of administrative law that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." [15] 354 U.S., at 372. There is nothing in this Court's opinions to suggest, as AFL does (Br. p. 27), that the principle is to be restricted to cases "involving personal civil liberties." Indeed, in a mineral leasing case, *Chapman* v. *Sheridan-Wyoming Co.*, 338 U.S. 621, 629 (1950), this Court, in dealing with a contention respecting an alleged violation by the Secretary of Interior of his regulations, observed: "That [the regulation] binds him as well as others while it is in effect is not doubted." *Cf. Atchison, T. & S.F. Ry.* v. *Scarlett*, 300 U.S. 471, 474 (1937). Nor are the policy underpinnings of the principle respecting an agency's obligation to follow its own regulations—*e.g.*, "the basic human claim that the law should provide like treatment under like circumstances," "the social value in encouraging the security of transactions," the elimination of "the cruder forms of influence from interested individuals . . . [and] reduc[tion] [of] pressures from the executive and from Congress," and the reduction of "expense and delay by avoiding the need for treating each case as *res nova*" (Friendly, *Definition of Administrative Standards*, 75 Harv. L. Rev. 863, 878-882 (1962))—any less relevant to cases involving economic regulation than they are to cases involving individual liberties. Accordingly, the lower courts have repeatedly enforced the principle in cases involving economic regulation by the various administra-

[15] See also, *e.g.*, *Hammond* v. *Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968) ("A validly promulgated regulation binds the government as much as the individuals subject to the regulation . . . and this is no less so because the governmental action is essentially discretionary in nature"); cases cited in note 16, *infra*.

tive agencies, including the Interstate Commerce Commission.[16]

Nor is there any other basis upon which the prejudicial non-compliance with the Commission's regulations in the case at bar can escape application of the *Service* principle. The relevant considerations are as follows:

a. First, the regulations are mandatory in terms. They provide that the shipper's supporting statement "must" accompany the application for temporary authority, and that the statement "must contain at least" the information specified by subparagraphs 8 and 9, as well as that specified by the other subparagraphs. Perhaps a qualification permitting waiver for good cause shown may be implied, as the lower court suggested in a prior opinion dealing with these same regulations.[17] However, as we have already noted (*supra*, pp. 32-33), no request for waiver was made of the Commission, nothing in the Commission's order hints that it was based upon any such theory, and so far as appears no sound reason could have been advanced to justify DOD's broadscale failure to comply.

b. Important economic interests of appellees are at stake in the proceeding. AFL speaks of the "relatively short duration" of a grant of temporary authority; but the emphasis should be on "relatively" and not on "short." Under this Court's decision in *Pan-Atlantic Corp.* v. *Atlantic Coast*

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[16] See, *e.g.*, *Upjohn Co.* v. *Pennsylvania R.R.*, 381 F.2d 4 (6th Cir. 1967) (ICC); *Mississippi Valley Barge Line Co.* v. *United States*, 252 F. Supp. 162 (E.D. Mo. 1966), (ICC) *appeal dismissed*, 385 U.S. 32 (1966); *Pacific Molasses Co.* v. *F.T.C.*, 356 F.2d 386 (5th Cir. 1966); *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221, 224-225 (D.C. Cir. 1959); *School District 2 Fractional* v. *United States*, 229 F.2d 681, 686 (6th Cir. 1956); *McKay* v. *Wahlenmaier*, 226 F.2d 35, 40-43 (D.C. Cir. 1955); *Berchem* v. *R.F.C.*, 191 F.2d 922 (Em. Ct. App. 1951).

[17] *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453, 457 (W.D. Wash. 1968).

Line R.R. Co., 353 U.S. 436 (1957), a grant of temporary authority, despite the 180 day limitation in Section 210a(a) of the Interstate Commerce Act, was held to fall within Section 9(b) of the Administrative Procedure Act so that, upon application, the temporary authority is extended until termination of the permanent authority proceeding. In the case at bar, the permanent authority proceeding is far from over, but the first temporary authority order was issued some 17 months ago. In *Pan-Atlantic*, "as in a high proportion of the instances in which the Commission has extended a temporary authority beyond 180 days, [the] 'temporary' service already [had] been in effect for more than two years." 353 U.S., at 445 (Burton, J., dissenting). And of course AFL's gain during this period—revenues at the rate of $8,000,000 a year and climbing (*supra*, p. 5)—is appellees' loss.

c. This economic interest of appellees is one that, under the statutory framework, has legal status. The fundamental scheme of the Motor Carrier Act is one of regulated competition. The Act was passed because "the industry was unstable economically, dominated by ease of entry and a fluid rate picture" and "as a result . . . became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility." Therefore "Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition. . . ." *American Trucking Associations* v. *United States*, 344 U.S. 298, 312-313 (1953). The statutory requirement respecting issuance of certificates "bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market." *United States* v. *Drum*, 368 U.S. 370, 375 (1962) (footnote omitted).

The temporary authority statute represents a limited departure from this general scheme. It authorizes the Commission to grant temporary motor carrier authority "without hearings or other proceedings" in exceptional circumstances. But in recommending this legislation, the Commission represented to the Congress that it was sensitive to the need to administer its authority with caution lest undue damage be worked upon existing carriers. As the Commission put it, it "recognized that care would be necessary to protect the legitimate interests of other carriers. . . ." [18]

d. The procedures prescribed by the regulations represent an appropriate method of achieving that goal of "protect[ing] the legitimate interests" of existing carriers in the administration of the temporary authority statute. Where there is a genuine emergency that does not admit of any adversarial proceeding, none is required (*supra* p. 19). But where that is not the situation, as here, the regulations give existing certificated carriers an opportunity to rebut the claims made in the application and in the supporting shippers' statements (*supra,* p. 19). And, in particular, subparagraphs 8 and 9 insure, to the extent feasible in the absence of a plenary hearing, the disclosure of whatever evidence there may be respecting the inadequacies of existing service. This permits the Commission to come to a more informed judgment and also makes more meaningful the right of the protestants to file objections, for it enables those objections to be framed with specificity. Thus the regulations, related as they are to the information-gathering role of the Commission in an adjudicatory proceeding, significantly enhance the prospects of a fair and correct decision by the Commission. In that respect,

[18] S. Doc. No. 154, 75th Cong., 3d Sess. 2-3.

the regulations in principle stand upon the same footing as those involved in *Accardi* and *Vitarelli*, and upon an even stronger footing than those involved in *Service*, where the Secretary of State had simply barred himself in certain circumstances from reviewing determinations of his subordinates.[19]

We consider now the objections appellants raise to the application of the *Service* rule. In this connection, we consider certain suggestions of the Solicitor General, even though, as we have pointed out (*supra* p. 35), in the end he does not claim that in the absence of reasonable compliance the Commission is free to award the authority sought.

First, appellants repeatedly stress that "the record as a whole contained evidence that would support a grant of temporary authority" (AFL Br. p. 28; see also, *e.g.*, pp. 24, 27; Gov't Br. pp. 18, 20). We do not agree that this was so (see *infra* pp. 45-46). But for purposes of the *Service* issue, we are entirely willing to concede *arguendo* that it is. For there would be no point to the *Service* rule if it were applicable only where the action of the agency was invalid on other grounds—*e.g.*, for want of support in the record. In *Service*, the Secretary of State would have been free under the statute to take the action in question. But "[while] it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so . . . and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them." 354 U.S., at 388. So, too, in *Accardi*, *Vitarelli* and *Yellin*.

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[19] This was so of the 1949 regulations. The 1951 regulations related in a sense to a fair hearing. But the Court held that the action was invalid under either set of regulations. 354 U.S., at 388-89.

Here again the flaw in appellants' position is that, whatever can be said about the quality of the "record as a whole" as it stood without compliance with the regulations, that record might have been significantly altered had the regulations been followed. This is not a case, then, in which something akin to the "harmless error" rule can be brought into play. It is possible, of course, that the decision of the Commission might have been the same even had the regulations been followed. But it is also possible—in our view probable—that the outcome would have been different. The possibility that appellees "might not prevail" before the Commission even if the regulations are enforced is immaterial, for they are "at least entitled to have the . . . [agency] follow its rules and give . . . [them] consideration according to the standards it has adopted. . . ." *Yellin* v. *United States*, 374 U.S. 109, at 121.

Next, appellants say that, in promulgating these regulations, the Commission did not intend "to restrict its own powers in dealing with emergency situations, or to confer special procedural benefits upon protesting carriers" (Gov't Br. p. 21; see also AFL Br. pp. 25-27). But nowhere did the Commission say that the regulations could not be invoked by protestants. It is true that the Commission did not say explicitly that they *could* be so invoked; but neither did the executive and legislative agencies whose rules were held enforceable in *Service, Accardi, Vitarelli,* and *Yellin.* An agency, in establishing rules that are mandatory in terms, must be held to the natural and probable consequences of its acts. These regulations were promulgated in 1965, after *Accardi, Service, Vitarelli,* and *Yellin.* Those decisions established, if there were any doubt before (see *supra* p. 37 n. 16), that agency regulations have the force of law, are binding upon the administrator, and may be called into service by any party that has a legally

cognizable interest in the proceeding. As we have shown, appellees have such an interest.[20]

Beyond this—and here we come to the most fundamental infirmity in appellees' approach—where an agency establishes rules of the sort involved in this case, it should not matter whether the agency accompanies those rules with a disavowal of any purpose to be bound by them. To honor such an expression of intent would be to undercut the basic policy supporting the *Service* rule, for the result would be that the agency, at its unbridled discretion, could have it both ways. That is, it could invoke the rules and deny some applications solely on grounds of non-compliance, and then in other cases in no way distinguishable it could waive the rules and grant the applications. That, we surmise, is the consideration that finally led the Solicitor General to refrain from taking the position that the regulations are not binding where there is not reasonable compliance, for otherwise, as he puts it, there would be "the risks that applicants may not be treated equally" (Br. p. 22).

Appellants also argue that to enforce the regulations would be "inconsistent with the Congressional policy because it would limit the Commission's ability to act in emergency situations even though the record before it establishes the requirements of Section 210a(a)" (Gov't Br. p. 20). But there would be no more "inconsistency" than in *Service,* which involved restrictions by regulation on a

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[20] Insofar as secondary materials respecting the Commission's intent are relevant, they do not support the notion that the Commission regarded the rules as merely hortatory. "The rules require more complete information to be furnished by carriers and shippers, and set forth minimum standards of proof necessary for a grant of temporary authority." Seventy-Ninth Annual Report of the Interstate Commerce Commission, p. 39. "Requests for temporary authority to conduct regulated motor carrier service will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules. . . ." Interstate Commerce Commission Policy Release of January 23, 1968 (App. B to Gov't Brief).

statute that gave the Secretary full discretion to discharge employees; and so, too, in *Accardi, Vitarelli* and *Yellin*. As in *Service*, the Congress gave the Commission the power to grant temporary authority without prescribing procedures such as those here involved; but as in *Service* the Commission was not "prohibited from" adopting the regulations. 354 U.S., at 388. The regulations, in short, are not invalid under the statute. Moreover, as we have noted (*supra* p. 19), they do take account of true "emergencies" by bypassing many of the requirements that apply to a case like the one at bar; and if even these exceptions prove in practice to be too cumbersome, the Commission is of course free to amend the regulations.

Finally, appellants cite *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718 (1968), for the proposition that the regulations are not binding. But that case is readily distinguishable. There, when the railroad that was Railway Express Agency's link between Washington, D.C., and Richmond, Virginia, gave notice that it would discontinue its less-than-carload express service, REA applied for temporary authority to continue its shipments by truck. REA submitted supporting statements from eleven shippers, each of whom stated, *inter alia:* "I am currently obtaining the service I need from REA Express, and, accordingly, have had no occasion to seek express service from anyone else." 292 F. Supp., at 844. These supporting statements complied with subparagraphs 8 and 9 of the regulations. The shippers answered the threshold question of subparagraph 8 by saying that they had *not* made any effort to obtain express service from existing carriers, and the other questions were thereby rendered inapplicable. Thus the Commission's order could not have been set aside for want of compliance with the regulations.[21] The case, accordingly, does not re-

[21] The lower court in *Estes* evidently was of the view that, where a shipper says he has made no efforts to obtain the service from other

semble the situation at bar, where the Commission found that DOD had made efforts to obtain the desired service and where DOD's statement was grounded in allegations of unsatisfactory performance from carriers other than AFL.[22]

Of course, in normal course the failure of shippers to seek service from existing certified carriers will be fatal if those carriers assert they are willing and able to provide that service, for in such circumstances the statutory requirements will rarely be met. In *Estes*, the Commission evidently was of the view that, because of the alleged uniqueness of REA's service, such a result should not obtain.[23] Whether the Commission was right or wrong about that, it has nothing to do with the question in the case at bar whether non-compliance of the DOD statement with the regulations prevented favorable action on the application.

C. *The Deficiencies of AFL's Analysis.*

To this point, we have in the main been discussing the issues as they are briefed by the Solicitor General and as

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carriers, the regulations require him to explain why he has not. 292 F. Supp., at 844. A failure to offer such an explanation would doubtless in almost every case doom the application under the statute. Whether it would also violate the regulations is not in issue in the case at bar.

[22] The other decisions cited by appellants are similarly distinguishable. In *Bell Lines* v. *United States*, 1969 CCH Fed. Carr. Cas. ¶82139 (S.D. W. Va. 1969), *appeal docketed*, No. 893, 1969 Term, the court found that the shippers' statements, taken together, reasonably complied with the regulations, thereby distinguishing *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968), the decision followed by the lower court in the case at bar. ("The case presently before the Court does not fit into the context of the *Acme Cartage Co.* case . . . . In this case some of the many letters responded to every requirement of the rules, as shown by the Commission's 42-page chart above mentioned.")

So, too, the court found substantial compliance in *Superior Trucking Co.* v. *United States*, 1969 CCH Fed. Car. Cas. ¶ 82108 (N.D. Ga. 1969) (The statements "catalog the efforts made, without success, to secure plaintiffs' services."). And in *Roadway Express, Inc.* v. *United States*, 263 F. Supp. 154, 159 (N.D. Ohio 1966), the compliance with regulations issue was raised "for the first time" during oral argument, so that the court held: "This ground of objection . . . was not raised before the Commission and is deemed waived."

[23] In *Estes*, the Solicitor General argued to this Court: "[T]he courts and the Commission have repeatedly recognized the differences between the

they were decided by the lower court. As we have observed, AFL takes an entirely different approach to the case, an approach that is grounded in the view that DOD indicated it had *not* made efforts to obtain the desired service from existing certificated carriers and that accordingly the data required by subparagraphs 8 and 9 did not have to be provided. This approach, we have pointed out (*supra* pp. 22, 24-25), is not open in this case, both because the DOD statement cannot reasonably be read in this fashion and because the Commission's findings establish that it did not act upon the basis of such a view of the statement.

While these considerations are conclusive, it may be useful to note that, even were the DOD statement susceptible of the construction given it by AFL and even had the Commission adopted that construction, the application could not have been saved. It would simply have been deficient on a different ground—the ground, that is, of failure to make the statutory showing of an "immediate and urgent need" that cannot be met by existing carriers, as those statutory standards have been construed in the relevant Commission regulations.

To begin with, even apart from the failure of the DOD statement to comply with the regulations, the AFL application, as measured against the statutory standards, was extraordinarily weak. The Congress conceived Section 210a(a) as a provision that would apply only in cases of "emergency." "Such temporary grants would be limited to situations in which there was an emergency. . . ." S. Rep. No. 1650, 75th Cong., 3d Sess., p. 2; H.R. Rep. No. 2714, 75th

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express service performed by carriers such as REA and the ordinary freight service performed by general commodities motor carriers, such as appellants. *Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328, 332-333 (D. Mass.), *affirmed per curiam*, 376 U.S. 514; *REA Extension—Nashua, N.H.*, 91 M.C.C. 311, 324, 340-341; *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 579-583; *Mistletoe Express Service Extension—Texas*, 61 M.C.C. 735, 744-745; *REA Extension—Durant-Kosciusko*, 34 M.C.C. 111, 114." Motion to Affirm, pp. 4-5.

Cong., 3d Sess., p. 3. That conception was presumably grounded upon the Commission's statements in proposing the legislation. The illustrations employed by the Commission had to do with the "emergencies" created by "[t]he bringing in of oil wells in a new field and conditions created by a flood or other calamitous visitation. . . ." S. Doc. No. 154, 75th Cong., 3d Sess., pp. 2-3.

On the face of DOD's statement, sweeping assertions and all, it is hard to see how the unavailability of AFL's service would resemble such a "calamitous visitation." As AFL grants (Br. p. 36), "No claim was made that the Department was unable to move freight between any points in the territory." In fact, DOD for many years relied entirely upon carriers other than AFL. Doubtless if DOD had restricted its claim to the movement of munitions and other materials destined for our forces in Vietnam, that claim would have been entitled to special consideration. But DOD did not do so. Rather DOD's claim rested upon the "immediacy" and "urgency" of its need for swift transportation of all commodities between all points in a 14-state region. Thus, DOD's claim came down simply to an undifferentiated plea for more efficient overall service. It is hardly surprising, then, that within two weeks of submission of its first statement to the Commission DOD twice represented that it was "not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (*supra* pp. 8-9); that even after filing that statement DOD referred to it as "an expression of the desire of the Department of Defense to have available to it the type and quality of service which American Farm Lines has provided *regardless of the carrier(s) which might provide same*" (A.141a); and that DOD at that point denied that its support of AFL was "in [any] way an expression of dissatisfaction with any carrier members" of American Trucking Associations (A.141a).

Apart from the "immediate and urgent" need standard, the statute also requires that the applicant show that existing certificated carriers cannot meet that need. It is that requirement to which the regulations here in question are especially relevant. They oblige the supporting shipper to disclose whether or not he has made an effort to secure the service he wishes from certificated carriers. If he has not, the applicant will be hard pressed to establish that those carriers are unable to meet the shipper's needs, no matter how immediate and urgent they be. The Commission found that DOD had made such efforts but that they were unsuccessful, and awarded temporary authority despite the fact that, as the Solicitor General concedes, the DOD statement did not in several respects supply information called for by the regulations. Thus the narrow issue before the lower court, and before this Court, is whether, to what extent, and with what consequences the DOD statement did not comply with those regulations.[24]

Had the Commission adopted AFL's present view—that DOD admitted it had made no efforts to secure the service it desired from existing carriers—the litigation before the Commission and the lower court would have had a very different focus, but the impropriety of granting temporary authority would have been just as evident. Indeed, one can fairly surmise that the Commission did not adopt AFL's approach because of its manifest weaknesses.

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[24] AFL raises as a separate issue the question "[w]hether the record as a whole contained evidence to support the Commission's grant of temporary authority . . ." (Br. p. 3). However, as AFL acknowledges, "the district court did not reach" this question (Br. p. 33 n. 23). Nor was it presented in the jurisdictional statements. See Rules 15(1)(c), 40.1(d)(2). Nor has the Solicitor General asked that it be considered. Nor will other appellees discuss it in their briefs, we are advised. Moreover, as we indicate in this portion of our brief, AFL's analysis of the relevant evidence is colored by its unique reading of the DOD statement. In such circumstances, we confine our discussion to the only issue properly raised and fully briefed—the compliance with regulations issue—and treat the statutory standards only insofar as they bear on that issue.

In the first place, the threshold question would of course have been whether the DOD statement could bear such an interpretation. It cannot, as we have indicated (*supra* p. 24). But beyond that, if in truth DOD had said what AFL now asserts it did say, there would have been a total absence of probative evidence indicating that existing carriers could not meet DOD's reasonable requirements. AFL's argument to the contrary apparently would turn upon its notion that the only "real issue" before the Commission was "whether direct single-line service was available to the Government to any meaningful extent" (Br. p. 31). That was so, in AFL's view, because of the "rather obvious proposition that direct single-line service is faster and safer (a particularly important consideration where many tons of explosives are being transported) than circuitous multiple line service" (Br. pp. 30-31). And, AFL's argument runs, the only "real issue" was properly resolved in AFL's favor since the evidence showed that the "majority of all certificated service available to the Department is provided on a joint-line basis" and because "virtually all certificated carriers are required to follow regular routes" (Br. pp. 36, 37, 31).

Apart from the fact that such an analysis would not justify the grant of authority respecting the many points between which certificated carriers did have single line authority (*supra* pp. 12-13), the difficulty is that the "rather obvious" superiority of "direct single-line service" is not obvious at all, either to us or to the Commission, judging by its regulations. It is, of course, theoretically possible for the single-line irregular route carrier to move commodities faster than the joint-line regular route carriers. But by and large that possibility, even as a theoretical matter, is not to be measured in large blocks of time. The interchange of truckload traffic between carriers engaged in joint through-route service does not normally involve the trans-

fer of lading from one trailer to another; and sometimes it does not even involve the change of tractors or drivers. (See, *e.g.*, A.25a, 224a). Moreover, between major shipping points there are generally only a few highways that are feasible alternative routes, and generally regular route carriers are authorized to move over those highways (see, *e.g.*, A.335a). Just as importantly, whatever theoretical advantage the single-line irregular route carrier may have is often more than offset by the practices and resources of joint-line carriers (see, *e.g.*, A.60a). Able management and adequate equipment and personnel are, in our view, much more important factors to the speed and reliability of service than anything else. These considerations may explain why DOD, after providing considerable detail as to the absence of single-line authority between various points, was unwilling to go further than to say that "in some cases" single-line service was markedly faster than joint-line service (A.198a-199a).[25]

Presumably for these reasons, but at any rate for some reason the Commission deemed adequate, the Commission has prescribed that the absence of single-line authority will not be considered a ground upon which to award temporary authority, but that rather the test will be the actual ability of existing certificated carriers to perform the desired service. The governing regulation is as follows:

> "(4) *Single-line service.* Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable

[25] As we have already noted (*supra* p. 27), this is the passage in DOD's statement that AFL repeatedly misstates by eliminating the "in some cases" qualification.

of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved." 49 F.C.R. §1131.4(b)(4).

This regulation reflects a principle the Commission has applied elsewhere in rejecting the argument that "joint line service is inherently inadequate." *Leonard Bros. Transfer, Inc.—Ext.-Californis-Texas,* 103 M.C.C. 263, 267 (1966); *Pine Tree Transport, Inc.—Extension—Frozen and Canned Fruits,* 54 M.C.C. 669 (1952); *Curtis, Inc.* v. *United States,* 225 F. Supp. 894, 900 (D. Colo. 1964), *aff'd,* 378 U.S. 128 (1964), and cases there cited. In view of this regulation and the case law, it is hardly surprising that the Commission in its order, and counsel for the Commission and the United States in their brief, do not share AFL's view that the adequacy of existing service is to be tested simply by a survey of Commission records relating to the authority of certificated carriers.[26]

II

The Lower Court Did Not Abuse Its Discretion in Holding the Commission's Order Invalid on the Ground That the Commission Acted Beyond its Authority in Reopening the Proceeding Without Securing Consent of the Court.

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[26] There are intimations in DOD's statement that it was also interested in AFL's service because AFL was able to provide a complete service respecting all commodities between all of the points in question (A. 201a). Appellants do not stress that consideration in their briefs. They hardly could. The Commission's rules again stand in the way.

"(5) *Complete service.* Requests for temporary authority on the basis of 'providing a complete service to a shipper,' even though existing carriers are participating in the traffic and in many instances can provide a substantial part of the service, require special justification. Generally, in such instances, the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper in their authorized territories, or that the supporting shipper has revised its distribution methods to such an extent that there actually is an immediate and urgent need for the complete service proposed." 49 C.F.R. § 1131.4(b)(5).

The district court's decision was based upon the alternative ground that the Commission had acted without authority in reopening the proceeding without permission of the court after the lawsuit had been instituted and a restraining order had been issued, and that this action by the Commission in excess of its authority warranted setting aside the order that was the product of the reopening. That determination was correct on both counts—that is (a) the Commission did exceed its authority and (b) it was within the district court's discretion to regard the default as fatal.

A. *The Source and Nature of the Principle Limiting Agency Discretion Where Judicial Review Proceedings Have Commenced.*

The principal thrust of appellants' arguments on this branch of the case seems to be that the holding of the lower court was erroneous because the pendency of petitions for reconsideration at the time the Commission reopened the proceeding kept alive the Commission's jurisdiction. We suggest that a more orderly analysis of the issue opens with the question whether, in the absence of the pendency of the petitions for reconsideration, the Commission's action would have been within its authority, and then, if the answer is that it would not have been, proceeds to the question whether the pendency of the petitions should change the outcome. Accordingly, we begin with a discussion of the basic principle involved.

That principle, as Professor Jaffe puts it, is that

> "While a case is in court the court's jurisdiction is said to be exclusive. The agency cannot act upon its order while the 'case' is 'in the court.' But when the court remands 'the case' to the agency, the agency once more

has jurisdiction." (*Judicial Control of Administrative Action* (1965) 709.)[27]

The Solicitor General evidently views the doctrine more narrowly, but he nonetheless concedes that one principal "inherent in the nature of judicial review" is that the "Commission cannot act in a manner inconsistent with the jurisdiction of the court" (Br. p. 26). So this Court stated in *Inland Steel Co.* v. *United States,* 306 U.S. 153, 160 (1939):

> ". . .[S]ince the court had exercised jurisdiction and suspended the [Interstate Commerce] Commission's report and order, the administrative body was without power to act inconsistently with the court's jurisdiction. . . ."

As this Court stated in 1883, the "general rule," subject to some qualifications not here pertinent, "is that an appeal suspends the power of the court below to proceed further in the cause," *Hovey* v. *McDonald,* 109 U.S. 150, 157 (1883). See also *Neely* v. *Eby Construction Co.,* 386 U.S. 317, 324 (1967); 6a Moore, *Federal Procedure* 3857.

The most obvious application of this doctrine is that if the inferior tribunal desires to reopen the record or to enter new orders pending review it must obtain permission of the reviewing court. See *Ford Motor Co.* v. *NLRB,* 305 U.S. 364 (1938); *Anchor Line, Ltd.,* v. *Federal Maritime Com-*

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[27] See also *Arrow Transportation Co.* v. *United States,* 176 F. Supp. 411, 415 (N.D. Ala. 1959), *aff'd,* 361 U.S. 353 ("Once jurisdiction is vested, it cannot be ousted" by subsequent orders of ICC.); *United States* v. *Herbold Laboratory, Inc.,* 267 F. Supp 53, 54 (D. Cal. 1967) ("Once [judicial] review is undertaken, neither the Commission nor any other entity has any jurisdiction to interfere in the matter."); *cf. Pan American Petroleum Corp.* v. *Federal Power Commission,* 322 F.2d 999, 1004 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 941 (1963); *Public Service Comm'n* v. *Federal Power Commission,* 284 F.2d 200, 206 (D.C. Cir. 1960).

mission, 299 F.2d 124, 125 (D.C. Cir. 1962), *cert. denied,* 370 U.S. 922; *McClatchy Broadcasting Co.* v. *Federal Communications Commission,* 239 F.2d 19 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 918. State law governing administrative agencies typically is parallel to the federal rule. 2 Cooper, *State Administrative Law,* 622 (1965). See also Section 15 (e) of the Revised Model State Administrative Procedure Act. And the rule also applies to federal courts and commissioners while their decisions are pending review. The principle is of ancient standing. Thus, in 1907 this Court, in *Liu Hop Fong* v. *United States,* 209 U.S. 453, 462, reversed the lower court for relying on a commissioner's supplemental finding because the additional finding "was made without order of the court" and "[w]e are not aware of any statute that gives the commissioner a right to make up and file such additional finding; he had made and filed a certified transcript in the case, and there ended his authority in the matter." Probably the most common application of the rule today occurs when a party moves for a new trial in the district court while the case is pending appeal. "[T]he practice is to permit such motions to be filed in the district court without leave, and if the district court considers the motion favorably it can then ask the case be remanded." *Krock* v. *Electric Motor & Repair Co.,* 339 F2d 73, 74 n.1 (1st Cir. 1964).

Apart from his reliance upon the effect of the petitions for reconsideration filed by some of the appellees, the Solicitor General's position that the Commission was free to act as it did is based, not on any precedent, for so far as we know there is none in his favor, but rather on the arguments that the "Commission informed the court of its action" and that the "court had an opportunity to stay operation of the second order pending review and, in fact, did so" (Br. p. 27). The first reason—that the Commission "informed

the court"—which seems to turn upon some notion of estoppel against the court, can be passed quickly. Whatever its merits might be in other circumstances, the argument has no place in this case. Not only was the Commission's motion for a stay filed *after* the Commission had already ordered reopening of the proceeding, but it was not noticed for hearing (*supra* p. 12). The Commission in the lower court expressed its "regret" at its "failure to call this matter for argument as required under local rules" (Br. pp. 10-11).

So the argument comes down to the fact that the Commission did not try to evade the initial restraining order and that the court had a chance to stay the second Commission order. But the reviewing court *always* can stay the action of the agency or the trial court, and the lower body almost *never* acts in contempt of a stay, so that in the Solicitor General's analysis the rule restricting the authority of the lower body is narrowed to the point of invisibility. This analysis will not serve. In the case at bar the Commission reopened its proceedings and then in its answer to plaintiff's complaint informed the court that it had mooted the original order for several reasons—including the desire to "receive evidence which this Court found was required to support a grant of temporary authority. . . ." (A.385a.) The court rejected the Commission's position because,

> "[j]urisdiction . . . vested in and had been exercised by this court in an extended evidentiary hearing wherein the ICC actively participated. . . . In these circumstances, without prior leave of court, [the] ICC was without authority to take any action which directly or indirectly might nullify or impair the jurisdiction of this court over the ICC order under review." (A.395a.)

Clearly that holding was not error. *Inland Steel,* to say

nothing of the other authorities cited above, declares as much.

Beyond these arguments, the Solicitor General seeks to distinguish some of the decisions upon which we rely on the basis that they dealt with review statutes different from those governing the Interstate Commerce Commission. He argues that when Congress "has intended" to preclude further agency action pending review, it has "expressly provided that the jurisdiction of the reviewing court shall be exclusive. . . ." "Absent any statutory prohibition . . . [against reopening the record, the Commission] was free to do so." (Br. pp. 25, 27). The fact is, however, that when Congress intends to deny the courts exclusive jurisdiction pending judicial review, Congress does so in very clear terms. Thus, in 1958 Congress revised the judicial review provisions for many of the major administrative agencies by granting the agencies *concurrent* jurisdiction with the reviewing courts for the time between filing a petition for review and filing the record. P.L. 87-791, 72 Stat. 941-951. See Senate Report No. 2129, 85th Cong., 2d Sess. (1958). While that Act applies to a wide variety of agencies, it was "not intended to apply . . . to the review of such agency orders as are by law reviewable by the district courts. . . ." (*Id.* at 2-3.) Accordingly, the Act does not empower the Interstate Commerce Commission to act concurrently with the reviewing court. And inasmuch as neither the Interstate Commerce Act nor the Urgent Deficiencies Act contains a similar grant of power to the Commission, the reviewing court's jurisdiction, by long-standing authority, is exclusive. *Hovey* v. *McDonald, supra,* 109 U.S. 150, 157 (1883).

B. *Enforcement of the Rule and the Relevance of the Prejudicial Error Doctrine.*

The Solicitor General's secondary position is that reopening the record did not prejudice the appellees. First of

all, he does not indicate why the prejudicial error rule should apply in a case like this. We think it should not, because a fixed rule is needed for the sake of orderly procedure. Either the Interstate Commerce Commission must obtain court permission before it reopens a case pending review or it need not do that. To inject the issue of prejudice into the matter is to invite breaches of the rule as well as litigation over its application.

But in any event there was prejudice here, for one of the important interests served by the rule was subverted. The rule serves not only the policy of orderly procedure and avoidance of unseemly conflict between court and agency, but also the policy of impartial adjudication by the agency. Administrative agencies act first as adjudicatory tribunals, and then, after they have issued their decision, as litigants defending the correctness of their action. The danger that derives from this dual role is that, if the agency reopens the proceeding after judicial review commences, it may act not as an impartial adjudicatory agency but as a litigant attempting to win a lawsuit. The risk is that once suit has been brought, and especially where the court has in preliminary fashion indicated reservations about one or another aspect of the agency's action, the agency may reopen the record simply in order to paper over defects that might not otherwise pass muster in the court.[28] The danger is not merely speculative. The Commission, for example, has been sharply criticized for superseding questionable boilerplate orders with *nunc pro tunc* "corrective orders." In *Dixie Carriers* v. *United States*, 143 F. Supp. 844, 852, (D. Tex.,

[28] In *Zuber* v. *Allen*, — U.S. —, — (38 U.S. L.Wk. 4040, 4049) (1969), this Court touched upon a related aspect of the reopening problem. There the Court refused to remand to the administrative department in the absence of a request by the Government, and refused to order a new trial, noting that "[w]hen action is taken on a record the department cannot then present testimony in court to remedy the gaps in the record any more than arguments of counsel on review can substitute for an agency's failure to make findings or give reasons."

1956) *vacated as moot*, 355 U.S. 179 (1957), a three-judge court stated:

> "The vice of the 'and good cause appearing' technique is that it affords nothing the parties or court can take hold of to scrutinize and measure as the basis for the action. That is compounded if, on a challenge, review is then thwarted by substituting something else."

Another three-judge court took up the matter with the Commission in *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 231 F. Supp. 422, 428 (N.D. Ill. 1964), where the Commission reconsidered its order while the case was pending review. While the court did not set aside the Commission's order because plaintiffs had entered into stipulations that estopped them from complaining, the court did discuss at length the dangers inhering in such reconsideration—that "an *ex parte* reconsideration of a judicial determination is made" "to perfect" a defense by the agency in court.

It is against these considerations that the Solicitor General's argument that there "was no prejudice" (Br. p. 27) must be measured. The notion seems to be that, as long as the final order of the Commission is legally unassailable except on the ground that the Commission reopened the proceeding without authority, a district court abuses its discretion in setting aside the order. Given the limited scope of judicial review of Commission actions, however, the fact that the Commission on reopening may have insulated its order from judicial rejection does not mean that the Commission's action is "correct" in the sense of representing an impartial disposition of the issues. Accordingly, the real test of prejudice should be whether, had the Commission applied to the court, the court might have taken action to

protect the right of the private litigants to such an impartial disposition by the Commission.

In this case, plainly such action might have been taken. The court, in the first place, might have concluded that the Commission was overly influenced by a desire to shore up its position in court, and accordingly might have denied a request to reopen. Beyond that, the court might have conditioned a grant of the request upon a variety of procedural safeguards. For example, it might have required that appellees be given an opportunity to cross-examine the DOD witnesses. Or it might have provided guidelines as to the specific details that DOD would be required to provide in the reopened proceeding, thus giving appellees a meaningful opportunity to reply. Or it might have obliged the Commission to speak in its final order to the compliance with regulations issue. To be sure, the court could not guarantee by these or any other conditions that the Commission, despite the attack upon its prior order, would act in a wholly impartial fashion upon the reopening. But neither can it be said that such steps would surely fail of the goal, particularly in view of the restraints that would flow from the consequent sharpening of the issues on judicial review. In short, since the Commission's action deprived appellees of the opportunity to secure such safeguards, that action undercut precisely those interests the doctrine of judicial control is designed to protect. Appellees *were* prejudiced.

The Solicitor General's second observation that seems to go to the question whether the court abused its discretion is that "[o]bviously, no party has a right to have an agency's errors preserved pending review" (Br. p. 27). The short answer is that the rule applied by the lower court does not confer that right upon anyone. It merely assures that the court can satisfy itself that the action of the agency will

not disrupt orderly procedure and that the agency will act, not as a litigant attempting to shore up its position by rewriting a record instead of writing a brief, but rather as a disinterested adjudicatory body.

C. *The Significance of the Petitions for Reconsideration.*

Appellants' chief contention is that, because some of the appellees had filed petitions for reconsideration that were pending at the time the Commission reopened the proceeding, the Commission did not exceed its authority. As to this argument, AFL's brief is heavily embroidered with observations that, in our view, have little if anything to do with the legal issues involved but that rather appear designed to show that it is unfair of appellees to complain about what the Commission did. Perhaps the notion is one of estoppel or something of the sort. But whatever it is, AFL is wrong for reasons we summarize in the margin.[29] In the balance

[29] As to what AFL regards as the "awkward situation in which appellees find themselves" in "arguing that their own petitions for reconsideration were unauthorized by ICC rules" (Br. p. 43), (a) many appellees did not file such petitions and (b) those that did were justified in taking such a precaution for if no petitions had been filed AFL doubtless would have advanced in the lower court the position it takes here, namely, that such petitions "were *required* to be filed" as a condition precedent to judicial review (Br. p. 45).

Next, AFL in a variety of ways argues that appellees' actions demonstrated that they were "fully prepared to continue with the pending proceeding before the ICC" and that they had not "at that time . . . perceived any inconsistency or conflict between" the court's jurisdiction and the Commission's action (Br. p. 40). But the only inference that can be drawn from filing the petitions is that those appellees were "fully prepared to have the Commission set aside its order. Moreover, a number of appellees in petitions to the Commission sought the vacation of the reopening order on the ground that "the Court having taken jurisdiction of this matter, the Commission was without power to reopen the proceeding" (A. 177a-194a). (See *supra* p. 12.) And the lower court noted that, in responding to the Commission's motion to stay, appellees asserted their view that the "ICC was not authorized to reopen its proceeding because this court had taken jurisdiction of the matter" (A. 391a).

of this text, we discuss the legal question as presented by the Solicitor General.

The threshold difficulty with the Solicitor General's contention is that, as the lower court held (A. 390a), the petitions "were not authorized by the applicable rule." The Commission's temporary authority rules provide in pertinent part:

> "*Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person." (49 C.F.R. § 1131.6(a).)

Division 1's order of September 3 did not "initially" grant or deny the temporary authority but rather reversed a prior order of the Temporary Authorities Board denying the authority. Thus, under the regulations, no further petition for reconsideration was authorized.[30]

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[30] Appellants rely upon Rule 101(g) of the Commission's General Rules, 49 C.F.R. § 1100.101(g). But under any normal canons of construction, the temporary authority rules, which are later in time and deal specifically with temporary authority proceedings, are controlling. "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute, which otherwise might be controlling. . . .'" *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957). Moreover, it is sensible to apply the special rules rather than the General Rules, for the restrictions of the former upon the filing of petitions for reconsideration are consonant with the general purpose of expediting temporary authority proceedings. The reference to the General Rules merely picks up incidental matters such as the number of copies to be filed. Finally, it is questionable whether the Commission could have established a rule authorizing reconsideration of orders of Division 1 sitting as an appellate division even if it had sought to do so. See *Transamerican Freight Lines* v. *United States*, 258 F. Supp. 910 (D. Del. 1966), a decision the Commission evidently concedes is in point but with which it disagrees (J.S. p. 16 n. 15).

But, even assuming the petitions for reconsideration were authorized by the Commission's rules, the result should be the same. The Solicitor General concedes that, since the Commission had denied appellees' motions to stay its order, the district court properly assumed jurisdiction of appellees' suits and was authorized to issue its restraining order (Br. pp. 23, 24). But once the agency has issued an order that adversely affects private parties so that court jurisdiction is properly invoked, the principle limiting the authority of the Commission to take further action without permission of the court must come into play if the interests of the private parties are to be protected. For the danger that the agency, under the guise of reconsideration, will act as a litigant rather than a neutral arbiter is just as great in the circumstances of the case at bar as it would have been if no petitions for reconsideration had been filed. The facts of this very case are suggestive in this respect. The court had issued a restraining order, in part at least on the ground of a showing respecting non-compliance with the Commission regulations (*supra* p. 11). The Solicitor General agrees that the Commission's purpose in reopening was to attempt to deal with that problem (Br. p. 27 and n. 20), and the Commission's answer states as much (A.385a). Had the Commission at that point demanded compliance with the regulations or at a minimum a showing as to why compliance was impossible, the argument that the Commission was only trying to "remedy a deficiency" (Gov't Br. p. 27) might ring more true. But that is not what the Commission did. Rather, it simply accepted additional evidence from DOD, entered a new order based upon that evidence and then returned to court urging—as appellants do here—that in view of this new evidence its case was salvaged.

Moreover, if there is to be any qualification of the general

rule based upon the pendency of petitions for reconsideration—and we think there should not be—that qualification should go no further than confirming the right of the Commission to grant or deny the petitions. By a denial, the Commission would simply be reaffirming its original order, and by a grant the Commission would, in whole or in part, be awarding the petitioners the relief they were seeking from the court. But that is not what happened here. Here the Commission did not act on the petitions for reconsideration. Nor did it even act on AFL's request that the hearing be reopened, a request that was not authorized under the rules. See 49 C.F.R. § 1100.101(b). Rather, the Commission reopened the proceedings "on the Commission's own motion" (A. 170b). Accordingly, to seize upon the pendency of petitions for reconsideration as warrant for the action taken, as appellants do, is to rest upon the most technical of considerations. Indeed, the Solicitor General seems so to recognize, for, after speaking of the petitions for reconsideration, he makes it clear that they are not esssential to his position: "Indeed, this authority [to reopen] does not even depend on the pendency of petitions for rehearing; Section 17 of the Act, 49 U.S.C. 17(6) and (7), 'empowers the [C]ommission at any time to grant rehearings as to any decision, order, or requirement and to reverse, change or modify the same' " (Br. p. 24). Thus, in the end his argument amounts to a plea for sweeping authority on the part of the Commission to reopen proceedings during any stage of judicial review. Neither that argument nor any of its variations should be accepted by this Court.

Conclusion

For the reasons advanced above, the judgment of the district court should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 369.

AMERICAN FARM LINES,
Appellant,
v.
BLACK BALL FREIGHT SERVICE, et al.,
Appellees.

No. 382.

INTERSTATE COMMERCE COMMISSION,
Appellant,
v.
BLACK BALL FREIGHT SERVICE, et al.,
Appellees.

On Appeal from the United States District Court for the Western District of Washington

BRIEF OF APPELLEES

~~Dealers Transit, Inc.~~, and United Transports, Inc.

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STATEMENT OF THE CASE

American Farm Lines, one of the appellants in these consolidated proceedings, filed an application before the Interstate Commerce Commission pursuant to statutory au-

thority contained in 49 U. S. C. A., § 310a(a) seeking to provide a single line motor carrier service from designated states in the central portion of the United States to designated states on and near the West Coast. Filed with the original application was the statement of support of the Department of Defense. An initial grant of authority based on the initial statement of support was temporarily enjoined by the Court below and prior to the time that the Court reached that matter for a final disposition, an order of the Interstate Commerce Commission was made reopening the proceedings for the receipt of additional support on behalf of the Department of Defense and for the receipt of additional protests on the part of all of the motor and rail carriers who desired to appear.

Following the receipt of the second round of support statements and protests thereto, supplemental proceedings were commenced in the Court below, again challenging the validity of the order of the Interstate Commerce Commission granting temporary authority to American Farm Lines, with the result that an expedited hearing was had and the decision of the three-judge District Court for the Western District of Washington, Southern Division, was filed March 26, 1969, and is reported at 298 Fed. Supp. 1006 (388a).

That decision presents at length the pertinent facts which are condensed in the foregoing paragraph.

The basis of the claim of the plaintiffs in the District Court below was that there had been a failure of compliance on the part of the applicant, American Farm Lines, with the rules of the Interstate Commerce Commission regarding the requirements for applications for temporary authority and support thereof and that there had been a violation on the part of the Interstate Commerce Commission of its duty under the statute which gives the Commission authority to consider applications for temporary authority.

The District Court found, in substance, that there had been a failure on the part of American Farm Lines properly to support its application and a failure on the part of the Commission properly to discharge its statutory function.

From this adverse decision, both American Farm Lines and the Interstate Commerce Commission have appealed.

In this Court, there are a number of appellees, all of whom operate as common carriers pursuant to authority granted them by the Interstate Commerce Commission. These include both rail and motor carriers whose interests are reflected by the several briefs filed and to be filed in this proceeding.

This brief is filed on behalf of the appellees, Dealers Transit, Inc. and United Transports, Inc., both motor carriers.

THE ISSUE

The determinative question raised by this appeal is whether the Rules and Regulations of the Interstate Commerce Commission governing applications for temporary authority apply to applications made by a farm co-op supported solely by the Department of Defense.[1]

RULES HAVE FORCE OF LAW

This Court, referring to its decision in **Accardi v. Shaughnessy**, 347 U. S. 260, held in **Service v. Dulles**, 354 U. S. 373, that:

> "Regulations validly prescribed by a government administrator are binding upon him as well as the citizen."

---

[1] Briefs filed by appellants raise subsidiary questions and fact questions, neither of which determined the result below.

The rule was refined in **Atwoods Transport Lines v. U. S.**, 211 Fed. Supp. 168, 170, aff'd. per curiam 373 U. S. 377, in the District Court's language:

> "Rules . . . promulgated . . . pursuant to statutory authority . . . have the force and effect of law . . ."

This salutary pronouncement is not to be dissipated by such arguments that literal compliance is not required or those that advance that no harm can come through lack of compliance. If, as the government asserts, only "the most finicky notion" would require specification of deficiencies alleged against these and other carriers, then these concede that their representation has been indeed finicky. The law requires it.

THE APPLICABLE RULES

At the inception of motor carrier regulation, statutory basis for grants of temporary authority was lacking, later to be supplied by Congress at the request of the Interstate Commerce Commission to deal with emergency situations. These were defined in part as "urgent need" which "suddenly develops" by "conditions created by flood or other calamitous visitations".[2]

Thus moved, Congress enacted § 210a(a) of the Interstate Commerce Act [49 U. S. C. 310a(a)] authorizing the Commission to grant temporary motor carrier authority (1) "to enable the provision of service", (2) "for which there is an immediate and urgent need", (3) [where there is] "no carrier service capable of meeting such need".

With this statutory authority, the Commission dealt with applications under regulations promulgated in form that was lawfully changed as experience dictated and discharge of statutorily imposed duty required.[3]

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[2] Sen. Doc. No. 154, 75th Cong., 3rd Series, pp. 2-3.

[3] Events and changes prior to 1968 are not deemed consequential, and are thus not included.

On January 23, 1968, against a background of 30 years of dealing with such matters, the Commission recognized existing problems, undertook to rectify or alleviate them, and, by a policy release, reaffirmed its resolve to enforce the regulations promulgated in 1965 in Ex Parte 67, 98 M. C. C. 483, and clarified its policy. The Commission said:

> "Because of 'slipshod' preparation of many of the applications the Division frequently has found it difficult to reach an informed and equitable decision . . . Foremost among the complaints . . . are . . . failure of the applicant . . . to submit supporting statements which contain all the information required by § 240.2(c) of the temporary authority rules."

The Commission then warned:

> ". . . Division 1 will deny temporary authority applications in which, because of non-compliance with the rules, a fair adjudication is not possible . . ."[4]

---

[4] Text of the Release, cited in footnote 5, p. 456, **Acme Cartage Co. v. U. S.**, 290 F. Supp. 453, is:

The following ICC policy release was issued January 23, 1968:

"POLICY CLARIFIED FOR ICC ACTION ON APPLICATIONS FOR TEMPORARY AUTHORITY TO CONDUCT MOTOR CARRIER OPERATIONS.

"Requests for temporary authority to conduct regulated motor carrier service will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules.

"The clarified policy will be administered by Division 1, which handles operating rights matters.

"The Commission adopted this policy upon receiving recommendation from the Division because of the haphazard preparation of many of the more than 5,000 applications for temporary authority received annually. Most of the requests involve common carrier trucking. The applications usually result from an emergency or short term need of shippers, or when new products and commodities are developed and require immediate transportation services.

"Because of 'slip-shod' preparation of many of the applications, the Division frequently has found it difficult to reach an informed and equitable decision. Further investigation by the ICC staff often has been required in order to obtain necessary in-

Section 240.2(c) of the rules specifies eleven criteria as the minimum requirements of supporting statements, and makes no exceptions for the Department of Defense other than that its support might be furnished directly to the Commission uncertified.[5]

---

formation. Foremost among the complaints in this area are those concerning failure of the applicant or his representative to submit supporting statements which contain all of the information required by Section 240.2(c) of the Temporary Authority Rules. These rules are set forth in Ex Parte No. MC-67, Motor Carrier Temporary Authorities, 98 MCC 483, and 49 CFR 1131 (formerly 49 CFR 340).

"According to the clarified policy, Division 1 will deny temporary authority applications in which, because of non-compliance with the rules, a fair adjudication is not possible on the record before the Commission, without prejudice, however, to the filing of a new application conforming to the rules."

[5] Ex Parte No. MC-67, 49 CFR 420.2, 49 CFR 1131.2, provides:

"(b) How and Where Filed. A separate application for each temporary authority sought must be filed on Form BOR-95 (§ 1003.1 of this chapter). The signed original and six copies of each application and all supporting documents must be filed with the Bureau of Operations Field Office which has jurisdiction over the point at which applicant is domiciled, or such other field office as the Commission may designate in special circumstances.

"(c) Supporting Statements. Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense, must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a spe-

Section 240.4(b)(4) forbade consideration of substitution of single line service as a single sufficient basis for temporary authority:[6]

---

cific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known."

[6] "204.4(b)(4) Single-line service.—Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved."

REASON FOR RULES

Considered in a vacuum, rules pale into a lifeless unimportance of meaninglessness, and a slavish adherence to a rule simply because it is a rule runs counter to instinct of man. Reasons breathe life into rules, make them make sense, and require conformity, uniform application and enforcement. This is no abstract exercise, it is the very life blood of administrative regulation and of jurisprudence itself.

Why then does the Commission have temporary authority rules? It says to enable it to reach a fair adjudication, and it recognizes that to do so, it must have the information upon which such an adjudication can properly rest. In thirty years of experience in undertaking to provide service for which an immediate and urgent need has been shown where there was no carrier service capable of meeting such need, the Commission obviously had reached the conclusion that it could not discharge its duty to provide service unless it had possession of the facts. It had to be informed by the applicant and supporting shipper of what the need was before it could find that need to exist. Thus, it adopted the first five criteria of factual support. If then, from this it found a need at all, logically it progressed to the determination of the immediacy or urgency of such need, relying here on the next two criteria. These, if present, would form the basis for the first statutory specification if immediate and urgent need, and had the statute stopped here, perhaps the Commission would have and it could have, and its rules would have. But the statute also dictated that the need must be such that no carrier was capable of meeting it. Thus, the rules specified that the support should include (as number eight) efforts made to obtain service from existing carriers and results and (as number 9) designation of carriers who failed or refused to provide service and reasons given for such failure or refusal.

Patently, one who has not tried existing service should not be heard to complain of it, which number 8 is designed to prevent. Similarly, a carrier's service should not be condemned without the carrier being afforded an opportunity to be heard upon the matter, which number 9 is designed to prevent.

That the regulatory scheme is admirable is not argued. Neither is its effectiveness, where enforced, argued.

The mischief comes about not by enforcement but by the lack of it, or by its inconsistency. The pernicious[illegible]ness of ignoring rules is demonstrated here where carriers are condemned without a day in court, findings are made without support, and requisite findings either are not made at all or are incompatibly made.

We are still at a complete loss to understand or explain how the Commission could find the existence of an immediate and urgent need for the provision of service not met by existing carriers in a decision that recites:

> "That in balancing the scales of public interest, it is necessary to assure that the government's immediate and urgent transportation requirements be met by an expedited and flexible service which will be used to complement rather than replace existing services" (369a).

We are not aware that there is statutory authority to "complement" as distinguished from to "provide" service.

The reason for the rule is to furnish the Commission with facts on which fairly to adjudicate.

But, another reason also enlivens the rules.

Other carriers have a right to protest temporary as well as permanent applications, whether their interest be considered great or small. The two carriers on whose behalf

this brief is presented may possibly be considered to have a small interest in this grant of temporary authority for the obvious reason that they are concerned with the transportation of various kinds of vehicles and of heavy and cumbersome commodities (126a, 253a, 361a). But these are encompassed by the grant to American Farm Lines of unrestricted general commodity authority. To United Transports, Inc. and Dealers Transit, Inc., this is important, greatly important.

To enable carriers effectively to respond to allegations of failure or refusal of service, the rules recognize that they have a right to know with some measure of specificity what the complaints against them are, and the mere fact that such complaints may have been made by an arm of the government rather than by a private individual does not endow them with any sanctity. Unless given this information, required by the rules, effective protest is forestalled if not foreclosed, and protesting carriers are condemned without a charge.

Taken together, these two reasons not only support but compel the existence and enforcement of the rules.

RULES SUBJECT TO CHANGE

Committed to the Commission is not only authority to promulgate rules, but authority to change them. If the accumulated wisdom of the Commission dictated that the rules should contain an exception that would place transportation by a co-op for the government on a footing different from other transportation, the rules could be amended thus to provide. This is inherent in the exception already made and mentioned permitting the uncertified support of the Department of Defense to be sent directly to the Commission. But the authority generally to amend rules does not include the authority to amend them on a case by case basis.

NONCOMPLIANCE WITH THE RULES

It appears that the brief filed on behalf of the Interstate Commerce Commission concedes at pages 16 and 17 that there has been no compliance with the Rules of the Interstate Commerce Commission in this proceeding. As the District Court said.

> "The Caputo verified statement fails to show any efforts by the Department of Defense to obtain from existing carriers the service AFL seeks to provide or the identity of any existing carriers who failed or refused to provide the needed service and the reasons given for any such failure or refusal" (298 Fed. Supp. 1011).

There is every evidence in the record that the failure of the Department of Defense to comply with these particulars of the rules was occasioned by its recognition that compliance with the rules would compel denial of the authority sought.

Under date of April 30, 1968, Mr. Curtis L. Wagner, Jr., Chief, Regulatory Law Division of the Office of the Judge Advocate General of the Department of the Army, wrote to the General Manager of American Farm Lines, among other things:

> "However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (12a).

On May 10, 1969, Col. Woodrow W. Atkins, Staff Judge Advocate, wrote:

> "However, the DOD is not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (13a).

The support letter which formed the basis for the initial grant of temporary authority, dated May 15, 1968 (14a,

15a), made no effort at compliance with the rules and the subsequent statement of support (194a-209a) while longer is equally as deficient.

Perhaps this accounts for the Commission's statement that its authorization of service was "to complement" rather than to provide.

CONCLUSION

In granting authority in violation of its rules, the Commission also violated the rights of appellees. What the Commission did was not just unlawful, it was wrong.

This the District Court below recognized and thus corrected. The judgment should therefore be affirmed, for which in duty bound these appellees will ever pray.

Respectfully submitted

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On Appeal From the United States District Court For the Western District of Washington

---

BRIEF OF CERTAIN MOTOR CARRIER APPELLEES

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On Appeal From the United States District Court For the Western District of Washington

---

BRIEF OF CERTAIN MOTOR CARRIER APPELLEES [1]

INTRODUCTORY PARAGRAPH

These appellees do not disagree with appellants' briefs with respect to Opinion Below, Jurisdiction and Statutes And Regulations Involved. However, the questions pre-

[1] For listing, see Appendix A.

sented by these appeals are narrower than as presented in the brief of appellant, American Farm Lines (AFL). Moreover, the Statement Of The Case contained in AFL's brief presents a somewhat distorted picture of the development and operations of AFL.

I

THE QUESTIONS

1. Whether the Interstate Commerce Commission (Commission) was required, as a matter of law, to follow its regulations governing the processing and determination of temporary authority applications (hereinafter referred to as TA Rules).

2. Whether the Commission retained jurisdiction over the proceeding to reopen it after the Commission's order was stayed and proceedings for review by the lower court were begun.

II

STATEMENT

AFL was organized in 1964 as a "cooperative association" as defined by Section 15(a) of the Agricultural Marketing Act of 1929, 12 U.S.C. § 1141j.[2] The sole alleged purpose was to provide transportation services to its members. This type of service is exempted from economic regulation under section 203(b)(5) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(5).

Congress, in passing the Agricultural Marketing Act which defined and assisted in the development of agricul-

[2] Whether AFL has operated, since its inception, as a bona fide agricultural cooperative *vel non* is under consideration in a pending investigation proceeding by the Commission. That proceeding has been joined with AFL's application for permanent authority and joint hearings are presently under way. Docket Nos. MC-C-5835 and MC-129908 (Sub-No. 1). That it has not so operated is clear from the discussion, *infra*, pp. 3-6.

tural cooperatives, envisioned the growth of farmer organizations which would bring about a mutual self-help among farmers, pooling their various resources to assist one another as farmers. Congress further assisted in the development of agricultural cooperatives in passing the agricultural exemption provision of the Interstate Commerce Act. Nowhere in the legislative history of either statute is there any indication that these cooperatives could become general commodity carriers for the public at large, and the Commission has construed the section 203(b)(5) exemption to limit for-hire transportation for nonmembers to farm-related freight. In 1965, the Ninth Circuit Court of Appeals interpreted the exemption as permitting agricultural cooperatives to transport nonfarm-related freight for nonmembers to the extent such was "incidental and necessary" to the effective performance of a cooperative's farm-related operations.[3] The court related these terms to Northwest's transportation of nonfarm freight in this manner:

> incidental because limited to otherwise empty trucks returning from hauling member farm products to market, and producing a small return in proportion to Northwest's income from trucking farm products and farm supplies; necessary because it is not economically feasible to operate the trucks empty on return trips, and because the additional income obtained is no more than that required to render performance of the cooperative's primary farm transportation service financially practicable.[4]

In 1966, AFL began hauling freight for the Department of Defense (DoD). AFL claims that the provision of service to its members necessitates that it perform nonmember transportation to insure that its ve-

---

[3] Northwest Agricultural Cooperative Ass'n v. Interstate Commerce Commission, 350 F. 2d 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[4] *Id.*, at 255.

hicles are available to members and that members' products are transported in an economically feasible manner.[5] However, shortly after AFL began transporting DoD freight, it began to conduct a general trucking operation for DoD traffic disregarding the required incidental relationship to the operations conducted for its members. In February, 1968, a United States District Court enjoined AFL from operating in round trip service for DoD where no member movement was involved.[6] Thereupon, AFL began transporting DoD traffic in one direction and moving the vehicles empty in the opposite direction in order to effect a literal compliance with the injunction. The same court, on the same grounds, again enjoined AFL from providing this transportation which lacked any incidental relationship to the transportation of farm-related commodities performed for its members.[7] Both of these judgments have been affirmed by a United States Circuit Court of Appeals.[8]

Still undeterred, AFL continued to ignore the two injunctions in order to reap the economic benefits of operating substantially as a for-hire motor carrier for DoD traffic instead of as an agricultural cooperative for the benefit of its members. Plaintiffs in the two injunction proceedings filed a show cause petition citing AFL's violations of the injunctions.[9] The court concluded that

---

[5] Jurisdictional Statement of AFL, p. 5.

[6] Munitions Carriers Conference, Inc. v. American Farm Lines, 1968 F. Car. Cas. ¶ 81,993 (W.D. Okla.).

[7] Munitions Carriers Conference, Inc. v. American Farm Lines, Civil No. 68-148, D.C. W.D. Okla. May 28, 1968.

[8] Munitions Carriers Conference, Inc. v. American Farm Lines, 415 F. 2d 747 (10th Cir. 1969).

[9] AFL's implication that plaintiffs, seven motor carriers franchised by the Commission to transport general freight (including munitions), including some of the appellees in the instant proceeding, sought the injunctions and contempt ruling because its rates were generally higher than those charged by AFL, is highly mis-

AFL was in contemptuous violation of its injunctions in that the nature of AFL's operations and the fact that the bulk of its revenue is derived from government transportation demonstrated that it is in the general trucking business beyond the limited exemption allowed by law.[10] The court found that AFL's violations of the two injunctions "are demonstrative of the general devotion of defendants to their government traffic" and of "their preferential handling of such over the traffic of their own members." [11]

A further obstacle to AFL's for-hire trucking operations was Congressional enactment of legislation to specifically limit the amount of nonfarm, nonmember, traffic which could be handled under section 203(b)(5) of the Act.[12] The original bill was introduced at the request of the Interstate Commerce Commission, which sought a workable means to identify and proceed against illegal operators masquerading as legitimate farm cooperatives. The bill, as finally amended, proposed a limitation which would "enable bona fide agricultural cooperatives to continue to provide farm services without substantially affecting our national common carrier system." [13] The bill was acceptable to the Department of Agriculture, to the major farm groups—the National Council of Farmer Co-

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leading and myopic. Plaintiffs were combating what is considered in the trade "gray area" transportation, that type of competition which is unregulated, illegal and destructive not only of the involved carriers, but of the national transportation system. The Commission intervened in these cases on the side of the motor carriers.

[10] Munitions Carriers Conference, Inc. v. American Farm Lines, 303 F. Supp. 1078 (W.D. Okla. 1969), appeal docketed, No. 629-69, 10th Cir., Sept. 11, 1969.

[11] *Id.*, at 1084.

[12] Public Law 90-433, 82 Stat. 448.

[13] 114 Cong. Rec. 6760 (1968), Remarks of Senator Lausche, then Chairman, Senate Commerce Committee's Subcommittee on Surface Transportation.

operatives, American Farm Bureau Federation, and the National Grange—as well as to the transportation industry.[14]

Because of the formidable checks upon AFL's "incidental" operations and in order to continue to concentrate its efforts upon the more lucrative business of operating as a for-hire carrier for DoD traffic, AFL filed in May, 1968, the temporary authority application here under consideration. A grant of temporary authority would permit AFL to transport DoD traffic until a final determination by the Commission on the corresponding permanent authority application.[15] There is definite evidence that AFL, if permitted, would haul substantially more DoD traffic in the future. In AFL's fiscal year 1967, gross revenue from government traffic amounted to over one million dollars; in 1968, over four million dollars; and in the first six months of 1969, over four million dollars, which for the latter period constituted 65 percent of the total revenue of AFL.[16]

AFL's temporary authority application sought extensive rights to transport every type of commodity, without exception, moving on government bill of lading, between nine midwestern and southern states and five west-

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[14] Report of the Senate Commerce Committee, 90th Cong., 2d Sess., Senate Report No. 1152, page 18.

[15] Interestingly, the Commission there will have to decide whether an agricultural cooperative operating pursuant to the section 203 (b) (5) exemption may receive permanent motor common carrier authority under any circumstances. In a permanent application proceeding of another agricultural cooperative, a Commission Hearing Examiner recently found that the combination of the two operations would be repugnant to the national transportation policy and contrary to the public interest. Docket No. MC-133250 (Sub-No. 2)

[16] The figures were gathered by the Commission's Bureau of Investigation, in Docket No. MC-C-5835, Exhibit H-2. The exhibit was attached to appellees' replies to Motions of AFL For Stay Pending Appeal, filed below and with this Court (A. 412a).

ern states.[17] In an unprecedented move, DoD agreed to support this type of application.[18] The Commission's Temporary Authorities Board denied the application (A. 141a-142a) on the basis of the following evidence: a two-page letter filed by the sole supporting shipper, DoD, which noted, in very general language, that it had used the services of AFL on 1200 shipments and, due to recent court injunctions, was turned down on 700 truckloads of freight, that AFL's service was "excellent in every respect" and that its "shorter service is necessary as both a measure and a participant in 'shortening the pipeline'" of its vital military supplies. (A. 14a-15a) Protests were filed by almost a hundred motor carriers,[19] which pointed out that DoD's letter did not supply the information required under the Commission's TA Rules, that they were handicapped by the lack of any specific allegations of service deficiencies, and that they were capable and in fact were transporting DoD freight between the involved points and had not received any service complaints from DoD. (A. 16a-138a) One protestant stated that it was in receipt of a letter in which DoD wrote, five days prior to its letter of support, that DoD was "not in a position to state that there would be insufficient or inadequate service without American Farm Lines." (A. 11a, 113a-115a)

AFL petitioned for reconsideration and attempted to bolster the flimsy DoD support letter with seven exhibits

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[17] Specifically applicant seeks authority between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas, on the one hand, and on the other, points in Washington, California, Nevada, Utah and Arizona. (A. 10a-11a)

[18] The DoD witness in the hearing on AFL's permanent authority application testified that prior to its support of AFL, applications for single-line service were not being supported by DoD where adequate interline service existed. The witness testified that the policy restatement which permitted support of AFL was made in June, 1968, (MC-129908 (Sub-No. 1), Transcript, pp. 611-615)

[19] Numerous rail carriers also filed protests.

purporting to demonstrate the inadequate service of seven protestant motor carriers. Protestants filed replies to AFL's petition. On September 3, 1968, a three-member appellate division of the Commission granted the authority as sought. (A. 143a-148a)

Complaint was thereupon filed in the court below to set aside and annul the Commission grant of authority. (A. 149a-158a) On October 2, 1968, the court entered an order staying the effective date of the Commission's order. (A. 166a-167a) By order of November 5, 1968, the Commission, on its own motion, reopened the administrative proceeding in order to receive an additional statement of support from DoD and such reply statements as protestants might file. (A. 170a-171a) The Commission filed with the court below a motion to stay further proceedings, two days *after* it reopened the proceeding before it. (A. 167a-168a) Plaintiffs replied to the Commission's motion, but the Commission never called the motion for argument. (A. 392a)

The new statement of DoD was nothing more than an expanded version of its prior support letter—rife with generalized and unsupported statements of immediate and urgent need and void of the requested and required specificity. Following is a digest of the "evidence" contained in DoD's second support statement:

DoD stated that it "must effect movement of a vast quantity of a multitude of different commodities between innumerable points and places within the United States and abroad." In an 11-month period, DoD stated that it shipped some 720,000 tons westbound and some 250,000 tons eastbound between the states involved in the AFL application. This tonnage is broken down by origin states. Some 150 specific points in the involved states are then listed as origin and destination points; some 45 categories of commodities are named. (A. 195a-198a)

However, DoD indicated that only a "part" of this traffic requires expeditious handling and that this constitutes the basis of its support for AFL's application. Nowhere does DoD specify the portion requiring expedition. Thus the Commission was still without any specific information as to the *volume or traffic*, the *commodities* and the *points* in the involved territory requiring the services of AFL, which information the Commission had very clearly requested in its order of November 5.

DoD feels that the speed it requires cannot be met by existing carriers for three reasons. First, the "majority" of the service of certificated carriers is provided on a joint-line, rather than a single-line, basis. Secondly, "virtually all" carriers have authority over prescribed routes and travel over greater distances than if they held irregular route authority. And thirdly, "some" carriers use single drivers instead of two-man driving teams and use more than one power unit because "some" carriers do not license their power units in all states. (A. 198a-199a) These declarations were supported by complaints involving only two joint-line movements—one from McAllester, Okla., to Bangor, Wash., and one from San Jose, Calif., to Doyline, La. (A. 200a) The service was deemed inadequate when compared to the service of *existing* single-line carriers operating between those points! Thus, the only examples of poor service were between points where DoD admitted the existence of adequate service from other existing carriers. As throughout the statement, all carriers remained unnamed.

On the basis of its reasoning and the two examples, DoD next listed those points (28 origins to various destinations) between which it claimed no knowledge of single-line service. (A. 201a-203a) Again, DoD did not demonstrate that existing joint-line services between those points was unsatisfactory, or that any of the traffic moving between the points required expedition.

Finally, DoD asserted that there was need for expedited service in order (1) to guarantee the coordination of the arrival of inbound shipments with production schedules of various manufacturing plants and (2) to coordinate deliveries at air and sea ports before scheduled airlift or ship loading dates. (A. 204a-205a) But DoD submitted merely its own conclusions, without proffering the requisite evidence required by the TA rules to enable the Commission to make its determination. DoD claimed the first situation occurred at the Louisiana Ammunition Depot and the Pine Bluff Arsenal, but did not quote the actual volume of traffic moving there, any problems of unsatisfactory service from existing carriers, or other concrete evidence. Likewise, only a general allegation of the inadequacy of presently certificated carriers was made with regard to the second situation and only on movements from St. Louis, Mo., to San Francisco, Calif.

DoD's statement, while displaying a certain rhetorical adeptness, lacked the specificity required by the Commission's TA Rules and pointedly requested by the Commission in its order of November 5, 1968. Twenty-two motor carriers, five industry organizations and certain railroads responded to DoD's latest statement and a considerable body of evidence was amassed to refute it. (A. 210a-366a) The responses pointed out the statement's lack of compliance with the TA Rules and the Commission's order and noted that the statement was so vague that specific response was impossible. The respondents observed that they transported most of the traffic listed in the DoD statement and that they were unaware of any service complaints. They also denied the claimed interline delays, and delays at the various points due to late arrivals of their vehicles—rather the delay was shown by several exhibits to be due to late arrival of the vessels to be loaded. (e.g. A. 235a)

As the basis for its order of December 20, 1968, granting (for the second time) the authority sought, the Com-

mission was compelled to paraphrase DoD's inaccurate generalizations and unsupported conclusions. (A. 367a-370a)

The filing of the supplemental complaint in the court below, the full hearing on the merits, and the lower court's holdings are set forth in the briefs of appellants [20] and the decision, reported at 298 F. Supp. 1006, is included in the joint appendix. (A. 388a-400a)

III

HISTORY OF COMMISSION HANDLING OF TA APPLICATIONS

The Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act, 49 U.S.C. § 301 *et seq.*) requires full evidentiary hearings producing proof of public convenience and necessity before the Commission may authorize motor carrier operations. At the Commission's request, Congress amended the Act in 1938 by adopting a narrow exception to the above procedure in order to permit the granting of temporary authority, without hearings, at the Commission's discretion. The legislative history of the amendment is clear that the Commission was primarily seeking authority to cope with true emergencies. The Commission's justification used as examples "[t]he bringing in of oil wells in a new field and conditions created by a flood or other calamitous visitation. . . ." [21] Having enacted the Motor Carrier Act just three years previously in order to cure the overcrowded and overcompetitive situation in the industry by limiting permanent entry into the field, Congress was careful to include specific safeguards against the indiscriminate granting of temporary authority. Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. § 310a(a), as originally enacted, remains the same today:

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[20] Government Brief, pp. 10-11; AFL Brief, pp. 12-13.

[21] S. Doc. No. 154, 75th Cong., 3d Sess. 2-3.

> (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

One of the safeguards imposed by Congress in the 1938 amendment was the strict limitation in time upon the Commission's ability to grant temporary authority for not more than 180 days. In 1946 this safeguard was eliminated indirectly through Congress' passage of the Administrative Procedure Act (5 U.S.C. § 558).[22] As the Commission's authority under section 210a(a) evolved into a broader power than that originally granted, the Commission moved away from the ex parte summary disposition espoused by appellants and began providing other safeguards to preserve the service of existing carriers. The Commission, through its field offices, contacted motor carriers in the area to permit them to protest TA applications and to respond to the claim that existing motor carriers were incapable of providing the service needed.[23] Eventually, after 27 years of issuing temporary

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[22] In Pan-Atlantic S.S. Corp. v. Atlantic Coast R.R., 353 U.S. 436 (1957), this Court held that temporary authority is a "license with reference to an activity of a continuing nature" and, in accordance with section 9 of the A.P.A., remains in effect until the Commission has "finally determined" a corresponding application for permanent authority.

[23] See Bowen Transports v .United States, 116 F. Supp. 115, 117 (E.D. Ill 1953).

authorities, the Commission, on its own initiative, instituted a rulemaking proceeding. Representations of interested parties were submitted and, upon due consideration, the Commission prescribed procedural and substantive rules "to govern the filing, processing, and determination of applications by motor common and contract carriers for temporary operating authority." [24] These rules, set forth in their entirety as Appendix B hereto, are extensive and cover all phases of temporary authority proceedings. A brief summary of the six parts of these rules will emphasize the completeness of the Commission rulemaking in this area.

The first section recites the controlling statute, notes the applicability of the A.P.A. governing extensions of temporary authority beyond the statutory limitation, and defines several terms.

The second section concerns the filing of applications. All applications are to be filed at the Commission's field offices. Supporting statements must accompany applications and contain at least the eleven items of information enumerated. Emergency temporary authority applications (not involved here) follow special procedures and telegraphic and telephonic filings are permitted. Evidence of insurance and designated agents for service of process are necessary.

Part three provides for publication of a summary of the application in the Federal Register and the filing by interested persons of protests which must contain the specifics as to the service which such protestants can and will offer. This section also notes that the rate requirements of sections 217 or 218 of the Act must be met and places a 30-day compliance period within which a grantee must meet those requirements, as well as the insurance and service of process requirements.

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[24] Motor Carrier Temporary Authorities, 98 M.C.C. 483 (1965), 49 C.F.R. § 1131.

Part four governs the Commission's determination of applications. The Temporary Authorities Board or Division 1, acting initially, will make the first determination. Eight standards are set forth for determination of applications. These standards cover both general considerations and criteria for specific types of temporary authority applications, e.g., for single-line service, complete service to a shipper, and alternate routes.

Part five governs the timely filing of tariffs containing the rates, charges, and rules under which the grantee will operate.

Part six regulates the filing of petitions for reconsideration and replies thereto and states that the filing of such petitions will not operate as an automatic stay of an order granting temporary authority.

These rules are a logical outgrowth of the Commission's expansion of its authority under section 210a(a) of the Act. The original ex parte determination and summary procedures have yielded to a modified procedure which includes a no-oral hearing and provides substantial rights for both applicants and protestants. The Commission has not chosen to amend its rules since their promulgation four and a half years ago.

IV

SUMMARY OF ARGUMENT

Our position in this case can be stated briefly: the lower court's conclusions that the TA Rules are binding on the Commission and that the Commission did not substantially comply with them in granting temporary authority to American Farm Lines is based upon valid precedent and proper examination of the Commission proceeding.

As shown, the Commission chose to bind itself and limit its discretionary power after twenty-seven years of

experience in utilizing that power. This Court has already spoken on the importance of agency regulations and their binding power not only upon those who come before the agency but also upon the agency itself. *Service* v. *Dulles*, 354 U.S. 363 (1957).

Appellants' effort to read the lower court's decision as crippling the Commission's power to issue temporary authorities are strained. Strict compliance does not mean literal, mindless compliance. The Commission in its TA Rules requires, in mandatory terms, specific information as to shipper's efforts to obtain the needed service from existing carriers. The shipper, here had, in fact, utilized existing motor carriers for all its transportation needs until it began utilizing the services of the applicant, AFL. Furthermore, DoD thereafter continued to use the services of existing carriers along with those of AFL between all of the points for which temporary authority is sought. Thus DoD had fully-documented experience with existing carriers which would have been sufficient to comply with the TA Rules. Yet, the shipper chose to submit only general assertions of the inadequacy of existing services. These motor carriers were prejudiced by the Commission's decision to ignore its own rules and accept these general assertions. Existing motor carriers know of no service problems justifying the grant of authority made. If permitted to answer specific service failures, they feel certain they would have been able to refute them. But DoD did not refer to any specific failures. As a result grave economic losses to the existing motor carriers have resulted.

The issue raised by appellants as to whether the Commission possessed the power to reopen the proceeding, without permission of the lower court, after its order was stayed and review by the court was begun is clearly not dispositive of this appeal. The lower court's judgment may be affirmed solely upon the first issue. But, dealing with the merits of the second, the Commission is

"without power to act inconsistently with the Court's jurisdiction." *Inland Steel* v. *United States*, 306 U.S. 153, 160 (1939). That the Commission did exceed its power is clear from the fact that the Commission felt duty bound to request permission from the lower court, but never followed the rules of that court in order to receive a ruling thereon.

It is for these reasons we believe that this Court should affrm the lower court's judgment.

V

ARGUMENT

1. The Temporary Authority Regulations Are Binding On The Commission

The Commission set up in the TA Rules what it considered to be minimum standards of proof conforming to the statutory standards of section 210a(a) of the Act. The Commission must have felt that such standards were needed in order to assure an administrative record which would constitute the necessary evidence upon which it would then be able to determine whether there is "an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need," as required by the statute. The circumstances surrounding the enactment of the statutory authority and the promulgation of the TA Rules do not suggest, as appellants claim, that mere "guidelines" were being established. Therefore, the Commission must be deemed to have acted unreasonably when it condoned non-compliance with these rules by bestowing authority upon the party that violated them.

The courts have long held that regulations promulgated by an administrative agency in order to implement its statutory authority have the force and effect of law, and the agency as well as parties seeking determi-

nations thereunder, are bound by such regulations. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Mississippi Valley Barge Line* v. *United States*, 252 F. Supp. 162 (E.D. Mo. 1966); *Pacific Molasses Co.* v. *F.T.C.*, 356 F. 2d 386 (5th Cir. 1966); *Upjohn Co.* v. *Pennsylvania R. Co.*, 381 F. 2d 4 (6th Cir. 1967).

Appellants' arguments that the TA Rules were not intended to reduce the Commission's discretionary power must be rejected. In view of the terms of the TA Rules, the evolution of temporary authority grants and of the procedure therefore, and the background of the involved statute, there is no doubt that the TA Rules were intended and considered by the Commission to be followed. The regulations it promulgated are consistent with the clear language of the statute. The Commission chose to bind itself. Besides the mandatory language of the regulations themselves, the Commission further clarified its policy of reasonably strict adherence to these rules in a release issued two and a half years after they became effective.[25] This Court said, in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 422 (1942):

> Undoubtedly regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more. When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one "which we will follow in exercising our licensing power", they must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others

[25] The ICC policy release is set forth as Appendix B of the Government's Brief.

whose rights may be affected by the Commission's execution of them.

Even where the authority given to the agency is discretionary, this Court has upheld the rule that agencies must follow the requirements of their own regulations. *Service* v. *Dulles*, 354 U.S. 363 (1957); *Accardi* v. *Shaughnessey*, 347 U.S. 260 (1954); *Yellin* v. *United States*, 374 U.S. 109 (1963). And a lower court citing these cases held that agency action that substantially and prejudicially violates the agency's rules cannot stand. *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A. D.C. 1959), *cert. denied*, 376 U.S. 915 (1964).

In *Service*, the Congressional statute conferred "absolute discretion" upon the Secretary of State to discharge State Department or foreign service employees "whenever he shall deem such termination necessary or advisable in the interests of the United States." This Court held that the Secretary bound himself to certain departmental regulations, despite his argument to the contrary, and that, by ignoring these regulations, the Secretary exercised his discretion illegally. Contrary to appellants' contentions, substantial rights are involved here. Unjustified, unwarranted and illegal competition remains a constant threat to the health and soundness of existing motor carrier businesses, which comprise an important segment of our national transportation system. Common carriers have concommitant duties and responsibilities generally to serve all shippers and to transport not only truckload, but also their less-than-truckload traffic. AFL, on the other hand, has limited its service to the "cream" of the traffic, DoD's truckload traffic. In a little more than two and a half years, AFL was permitted by DoD to siphon off from regulated carriers, traffic grossing almost $10 million dollars, in highly questionable operations. Under a grant of authority here, appellees' future condition would be considerably altered to an even greater

extent by further diversion of traffic.[26] Additionally, there is no element as important as the national security in *Service*, which must be balanced against the interests of existing carriers. Rather the Commission is promoting an absolute right to issue temporary authorities without regard to its own regulations and beyond the intention of the legislators that gave the Commission its discretionary power.

In *Accardi*, this Court was also concerned with self-imposed limitations on agency discretion. The regulations there prescribed the procedures to be followed in processing an alien's application for suspension of deportation and supplemented "the bare bones of § 19(c)" of the Immigration Act of 1917. The Attorney General was required by this Court to afford aliens the due process of adherence to those regulations before he could exercise his discretionary power either affirmatively or negatively. Likewise protestants here should be afforded the due process intended by the regulations governing TA proceedings, to wit, that the supporting shipper must provide the information specified in the regulations before the Commission may make its determination.

2. The Commission Did Not Substantially Comply With The Temporary Authority Regulations

In *Accardi*, *supra*, at p. 268, this Court said:

> It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case, we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged *refusal to exercise* its own discretion contrary to existing valid regulations.

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[26] Appellant AFL noted in its Jurisdictional Statement at page 13 that final disposition of its permanent authority application is at least three years away.

Similarly, we are not here arguing the evidence; rather, we are objecting to the Commission's exercise of discretion and determination of immediate and urgent need in the face of a patent violation of valid temporary authority regulations. Items 1, 2, 3, 8 and 9 of the information which must be contained in any supporting letters were absent from DoD's support letter and subsequent support statement. These items are:

> (1) Description of the specific commodity or commodities to be transported (where the transportation of property in involved).
>
> (2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory, or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested).
>
> (3) Volume of traffic involved, frequency of movement, and how transported now and in the past.
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> * * * *
>
> (8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> (9) Names and addresses of existing carriers who have either failed to refused to provide the service, and the reasons given for any such failure or refusal.

That the violations were patent is clear. In the first place, there was only one supporting shipper, so that the required information could not be gleaned from multitudinous letters of support.[27] Secondly, due to the ex-

[27] The Commission in one case considered 33 letters of support in their entirety to make its determination (Roadway Express, Inc. v. United States, 263 F. Supp. 154 (N.D. Ohio, 1966)) and over 400 letters in another more recent case (Bell Lines, Inc. v. United States, 1969 F. Carr. Cas. ¶ 82,139 (S.D. W. Va.), appeal docketed, No. 893, November 28, 1969).

tensiveness of the authority sought, the rules ((2) above) state that evidence of a *broad* need is required. Thirdly, a standard prescribed for single-line service applications (1131.4(b)(4)) notes that a grant of such applications is generally unwarranted and that they will be granted "only when it is clearly established that the carriers providing multiple-line service" are incapable or failed in meeting the shipper's reasonable needs. Fourth, the Commission, from the beginning of this administrative proceeding, was in possession of DoD's letter to AFL of April 30, 1968, which was a direct admission that AFL could not satisfy the statutory requirements. (A. 11a-12a) Fifth, the Commission admits that the lower court's first restraining order and that court's decision in *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968), were a clear signal of what was lacking in the basis of its grant of authority. (Government Brief, p. 19) And lastly, the Commission's order reopening the proceeding was a model of clarity in its instructions to DoD to supply the information it had not yet produced. (A. 170a-171a) Under these circumstances, there can be no excuse as to what was needed and why it was particularly necessary in light of the type of authority sought.

Appellants contend that protestants were in no way prejudiced by the lack of compliance exhibited in DoD's support letter and statement. Indeed, they now contend that appellees were not entitled to the information required to be furnished in any letter(s) of support. This argument stems from their proposition that protestants, under the rules, are only required to submit information as to the service they can and will offer. This reasoning cannot be taken seriously in view of the Commission's order of November 5, 1968. In that order reopening the proceeding to receive a "reinforced" support letter, the Commission further ordered that "protestants may submit verified statements in response to any statement sub-

mitted by applicant." (A. 170b) Surely the Commission was offering protestants no greater rights there than those already provided for in the TA Rules.

Appellees, along with other ICC-regulated carriers have hauled the freight which DoD ships for many, many years. In 1966, DoD began obtaining a cheaper and allegedly swifter service from AFL for a portion of this traffic. DoD, alone, is in the position to validate its claim that it needs AFL's service and that AFL's service is indeed more expeditious than that provided by existing certificated motor carriers. This largest of shippers, with vast numbers of employees, is in a unique position to supply the information required. Furthermore, the burden to make the necessary presentation is upon applicant with the assistance of its supporting shipper, and not upon protesting carriers. Protestants specified their ability and willingness to provide the service which DoD had already stated was adequate and had not complained of in the past. Protestants were not given the opportunity to reply to any *specific* instances of service refusals, failures, or deficiencies because none were claimed by DoD. This is the prejudice with which protestants were faced. General allegations based upon contrived rationalizations replaced concrete evidence of service inadequacy. The Government, in contending that "it is difficult to see how the absence of names and addresses and dates prejudiced the protestants in this case," makes sport of protestants' right to prove their own capabilities.

Appellants claim that the lower court demanded rigid, literal (rather than reasonable) compliance with the requirements of shipper's support letters and that this overtechnical approach has been summarily rejected by this Court in *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va. 1968), *aff'd per curiam*, 394 U.S. 718. The important distinction between *Estes* and the present proceeding is that protestants in *Estes* did not allege that their "holding out" to the public was the

same as that of applicant. The Commission has continually found a difference between "general commodities", the authority held by protesting motor carriers in *Estes*, and "general commodities, moving in express service," the authority sought by Railway Express Agency, Inc., the applicant there. Because of this distinction, the requirement for an enumeration of any efforts made to obtain service from existing "general commodities" carriers became irrelevant. In contrast with the situation there, single-line service, as sought here, holds no "favored" position with the Commission; rather, the TA requirements for the enumeration of efforts to obtain existing service take on added significance so that the Commission can determine whether the shipper is merely expressing a "preference" for single-line service.

3. Lacking Permission, The Commission Did Not Possess Authority To Reopen The Proceeding After Its Order Was Stayed And Review By The Lower Court Was Begun

The lower court's holding on this issue was supplementary to its finding that both the original application with its cursory letter of support and the "reinforced" support statement were deficient in meeting the requirements of the TA Rules. The lower court was, however, clearly concerned with the Commission's attempt to nullify its review by reopening the administrative proceeding after the court had assumed jurisdiction. The court cited one of the Commission's own decisions, *Central Freight Lines, Inc.* v. *Strickland Transp. Co., Inc.*, 102 M.C.C. 291, 298:

> Moreover, when the Court has exercised jurisdiction to review and suspend a report and order of the Commission, we are without power to act inconsistently.

On review of that decision, in *Strickland Transportation Co.* v. *United States*, 274 F. Supp. 921, 925 (N.D. Tex.

1967), *aff'd per curiam*, 389 U.S. 574 (1968), the district court said:

> When a reviewing court has set aside administrative action found not supported by the evidence and has remanded the matter for further consistent proceedings, the Commission is without power to act except in accord with the court's mandate. Inland Steel Co. v. United States, 1939, 306 U.S. 153, 59 S. Ct. 415, 83 L. Ed. 557. . . . Courts are not procedural pawns whose opinions can be frustrated through administrative misadventure. . . .
>
> It is not pride or arrogance that makes it important that echelons, tiers, and hierarchies of courts be more than tables of organization. Our judicial system is premised on tiered decisions. We are not dealing with the trivia of a pecking order but are concerned that the words of a higher court command the respect due them.

The Commission now advances the argument that it was attempting to alleviate the necessity of longer judicial proceedings when it became aware of the deficiencies in its original grant of authority through the lower court's proceedings on the temporary injunction as well as through that court's decision in *Acme Cartage Co.* v. *United States*, 290 F. Supp. 453 (W.D. Wash. 1968). The reopening, according to the Commission, was for the purpose of complying with that court's rulings. (Government's Brief, p. 27). However, in light of the fact that the reopened proceeding elicited none of the information which the lower court found was required by the Commission's own rules, and that, despite this, the Commission again granted the same authority to AFL, it appears that the Commission attempted to frustrate the lower court with a more formidable record to support its administrative decision without acceding to the primary principle consistently upheld by that court—that agencies must follow their validly promulgated regulations.

The Commission contends (1) that the proceeding was not administratively final and (2) that, regardless of administrative finality, its proceedings are always open for rehearing and review, so long as its actions are not inconsistent with the jurisdiction of a reviewing court. (Government's Brief, pp. 23-24)

As to the "administrative finality" of the Commission's processing of AFL's application for temporary authority at the time complaint was filed below, much is made in AFL's brief of the continued activity by various appellees in filing petitions for reconsideration, and otherwise participating in further proceedings before the Commission. (AFL's Brief, pp. 40-43) It is certainly true that some of the appellees herein filed petitions for reconsideration prior to their initiation of proceedings seeking judicial review. In view of the Commission's neglect of its own rules throughout the proceeding, this further attempt to gain a reversal of the order granting authority to AFL cannot be construed as an admission that the decision of Division 1, acting as an appellate division, was not administratively final. The Commission must be blamed for any confusion because of its own past actions not in accordance with the rules.

Once judicial review proceedings were begun, appellees did not continue to petition the Commission for reconsideration.[28] Appellees remained steadfast in their conviction that the court assumed exclusive jurisdiction over the matter. When the Commission, on November 7, 1968, moved the lower court to stay further proceedings on the ground that it had already reopened the proceeding two days earlier in order to receive additional evidence from the Department of Defense, appellees promptly filed a reply thereto on November 14, 1968, contending that the

[28] Appellant AFL, at page 41 of its brief, inaccurately attributes several petitions for reconsideration filed by three protestants after court review was begun to appellees herein. Those protestants were neither complainants below nor appellees here.

Commission was without authority to proceed further. Appellees fully expected that the Commission would call its motion for argument, as, indeed, it should have.

Appellees continued participation in the administrative proceeding consisted of petitions to the Commission to vacate its order, and upon the failure of the Commission to rule thereon, responses to the support statement of the Department of Defense. Appellees considered that response was necessary in order to protect their legitimate interests and to preserve their right to further participate in the event the court should grant the Commission's motion for a stay and permission to reopen. Their participation thus did not constitute acquiescence in the propriety of the Commission's reopening order.

In determining the question of "administrative finality," who filed what is not as important as what the rules, as interpreted by reasonable men, provide. The TA Rules must be read in the first instance. These rules are complete, substantively and procedurally, as shown *supra* (pp. 13-14). Rule 1131.6(a) provides:

> (a) *Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 *initially* granting or denying temporary authority in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person. (Emphasis supplied)

The September 3, 1968, order was issued by Division 1 of the Commission acting in an appellate capacity, which situation fits neither of the above categories. Where the TA Rules apply to all three decisions (i.e. of the TA Board and of the Division acting initially or in an appellate capacity), they so state. For instance, TA Rule 1131.4 (b) reads, in part:

> The following standards shall be used by the Temporary Authorities Board, and by Division 1 of the Commission acting initially or *in an appellate capacity*. . . . (Emphasis supplied)

Promulgated in 1965, the TA Rules take precedence over the General Rules of Practice promulgated much earlier. Furthermore, the TA Rules are specific in this regard. To ignore that specificity here is to render the rules meaningless and violative of the normal rules of construction. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222 (1957).

The Commission's inconsistency and error are equally evident. On the one hand, it denies the substantive importance of the TA Rules. On the other, it would impose all of the procedural provisions of the General Rules of Practice governing reconsideration to the processing of temporary authority applications.[29] The TA Rules were promulgated to provide a modified procedure for the processing of temporary authority applications; in an expedited proceeding, a limited review process by the Commission is necessary and reasonable. The General Rules of Practice had no applicability to the processing of temporary authority applications, prior to the promulgation of the TA Rules, because there was no established proceeding for TA applications. The phrase in TA Rule 1131.6(a), *supra*, "[p]ursuant to and in accordance with the Commission's General and Special Rules of Practice," obviously applies to the time within which petitions may be filed, number of copies, and the other minor details found in General Rule 1100.101, which are not covered by, and are not in conflict with the TA Rule.

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[29] Were the General Rules applicable here, then we submit that there is a strong judicial holding, based on a thorough study of the Congressional history of the enactment of section 17 of the Interstate Commerce Act, that a decision of an appellate division is not further reviewable by the Commission. Transamerican Freight Lines, Inc. v. United States, 258 F. Supp. 910 (D. Del., 1966).

The Commission's other attempted justification for reopening its proceeding after judicial review was begun is that it possesses continuing jurisdiction over its orders and, not otherwise bound by statute, it may reopen and reconsider its proceedings at any time.[30] The Commission admits being limited by the *Inland Steel* principle, but finds no inconsistency in its action here. It considers that it possesses jurisdiction to review its orders even while judicial review is pending, regardless of authorization from the reviewing court. Clearly, this cannot be the principle espoused by this Court in *Inland Steel Co.*

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[30] As the Commission notes in its brief (p. 26, n. 17), it has proposed legislation (S. 2242, 91st Cong., 1st Sess.) to amend section 17 of the Act to provide for review of its orders in courts of appeals. The proposal is based upon the recommendations of the Administrative Conference of the United States, Committee on Judicial Review. The Committee recommended a procedure similar to review of orders of the Federal Communications Commission, the Federal Maritime Commission, the Secretary of Agriculture and the Maritime Administration, found at 28 U.S.C. §§ 2341-2351. Noticeably lacking therein, yet grafted onto the proposed legislation submitted by the Commission, is the section it referred to in its brief, i.e., permitting reopening up to the time the Commission dockets the record.

Another section of the proposed legislation (not referred to in the Commission's brief) is, we suggest, more pertinent as conforming to the accepted concepts of judicial review and is similar to the review procedure of orders of the agencies mentioned above. That section reads, in part:

> If a party to a proceeding to review shall apply to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shall show to the satisfaction of such court (1) that such additional evidence is material, and (2) that there were reasonable grounds for failure to adduce such evidence before the Commission, such court may order such additional evidence and any evidence the opposite party desires to offer to be taken by the Commission. The Commission may modify its findings of fact, or make new findings, by reason of the additional evidence so taken and may modify or set aside its orders and shall file in the court such additional evidence, such modified findings or new findings, and such modified order or the order setting aside the original order.

A contrary view would make a mockery of court review of agency decisions whenever an agency whose action became the subject of a complaint chose to exercise its "discretion" to—for all practical purposes—recall the case from the court in order to "cooper up" its decision under review. To paraphrase the *Strickland* court's language, courts should not be procedural pawns whose authority can be frustrated, whether by administrative misadventure or, as here, deliberate agency action.

VI

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, it is submitted that this Court should affirm the judgment of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nelson J. Cooney, one of the attorneys for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of February, 1970, I served copies of the foregoing Brief on the several parties hereto, as follows:

1. On the United States of America, by mailing copies in duly addressed envelopes, with postage prepaid, to Honorable Erwin N. Griswold, Solicitor General, and John H. D. Wigger, Esq., Department of Justice, Washington, D. C. 20530.

2. On the Interstate Commerce Commission, appellant, by mailing copies, in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, and Arthur J. Cerra, Esq., its Associate General Counsel, at the office of the Commission, Washington, D. C. 20423.

3. On American Farm Lines, appellant, by mailing copies, in duly addressed envelopes, with postage prepaid, to its counsel of record, Joseph A. Califano, Jr., Esq., John D. Hawke, Jr., Esq., and Kenneth A. Letzler, Esq., 1229 19th Street, N. W., Washington, D. C. 20036; and William L. Peterson, Jr., Esq., and James M. Robinson, Esq., 401 North Hudson, Suite 200, P. O. Box 917, Oklahoma City, Oklahoma 73101.

4. On other appellees, by mailing copies, in duly addressed envelopes, with postage prepaid, to their counsel of record, William H. Dempsey, Jr., Esq., 734 Fifteenth Street, N. W., Washington, D. C. 20005; Ed White, Esq., 517 West Adams St., Chicago, Illinois 60608; and Robert E. Joyner, Esq., 2111 Sterick Building, Memphis, Tennessee 38103.

APPENDIX A

NAMES OF APPELLEES HEREIN

Alamo Express, Inc.
American Trucking Associations, Inc.
Black Ball Freight Service
Braswell Motor Lines, Inc.
Brown Express, Inc.
Central Express, Inc.
Central Forwarding, Inc.
Central Freight Lines, Inc.
Consolidated Copperstate Lines
D-C International, Inc.
Garrett Freightlines, Inc.
H. S. Anderson Trucking Co.
IML Freight Inc.
J. H. Rose Truck Line, Inc.
J. J. Willis Trucking
J. V. Harrison Truck Lines, Inc.
Miller Truck Line, Inc.
Navajo Freightlines, Inc.
Pacific Intermountain Express Co.
Red Arrow Freight Lines
Robertson Tank Lines, Inc.
T.I.M.E. Freight, Inc.
Transcon Lines, Inc.
Western Gillette, Inc.

APPENDIX B

49 CFR 1131. TEMPORARY AUTHORITY APPLICATIONS UNDER SECTION 210a(a) OF THE INTERSTATE COMMERCE ACT

Section

1131.1 Controlling legislation and definitions.
1131.2 Filing of applications.
1131.3 Processing of applications.
1131.4 Determination of applications.
1131.5 Rates, charges, and special permission applications.
1131.6 Petitions for reconsideration.

§ 1131.1 Controlling legislation and definitions.

(a) *Controlling legislation.* Section 210a(a) of the Interstate Commerce Act, as amended, 49 U.S.C. 310a (a), which the rules and regulations in this part are designed to implement, provides as follows:

To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Extensions of temporary authority beyond 180 days are governed by the special rules, contained in Part 1101 of this chapter, promulgated pursuant to section 558 of the Administrative Procedure Act, 5 U.S.C. 558.

(b) *Definitions.* As used in this part, the following words and terms are construed as follows:

(1) *"Temporary authority".* Limited-term motor carrier operating authority issued for periods up to 180 days (TA) pursuant to section 210a(a) of the Interstate Commerce Act to authorize transportation service for which there is an immediate and urgent need and which cannot be met by existing carrier service. This term includes "emergency temporary authority" issued for periods of 30 days or less (ETA) to meet an immediate and urgent need for service due to emergencies, in which time or circumstances do not reasonably permit the filing and processing of an application for temporary authority (TA).

(2) *"Common carrier by motor vehicle".* Same as defined in section 203(a)(14) of the Interstate Commerce Act (49 U.S.C. 303(a)(14)).

(3) *"Contract carrier by motor vehicle."* Same as defined in section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)).

(4) *"Aggregate of 180 days".* The total number of days of temporary authority which may be granted to a motor carrier under the provisions of section 210a(a) of the Interstate Commerce Act to meet a continuing need for a particular service.

(5) *"Person".* Same as defined in section 203(a)(1) of the Interstate Commerce Act (49 U.S.C. 303(a)(1)).

§ 1131.2 Filing of applications.

(a) *General.* All temporary authority applications are filed at and initially processed by the Commission's field offices. The field staff of the Commission's Bureau of Operations conducts preliminary investigations into applications for temporary authority and transmits the applications, with recommendations as to their disposi-

tion, to the Commission's Temporary Authorities Board in Washington, D.C. The Bureau's field offices maintain records of authorized carriers and their operating authorities, and its staff members are available for consultation and to give assistance in the obtaining of motor carrier service, and guidance in the preparation of temporary authority applications and related supporting material, and in making rate, insurance, and other required filings. The field offices will furnish copies of necessary forms upon request.

(b) *How and where filed.* A separate application for each temporary authority sought must be filed on Form BOR-95 (§ 1003.1 of this chapter). The signed original and six copies of each application and all supporting documents must be filed with the Bureau of Operation's field office which has jurisdiction over the point at which applicant is domiciled, or such other field office as the Commission may designate in special circumstances.

(c) *Supporting statements.* Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a specific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known.

(d) *Special procedures for filing applications for emergency temporary authority.* (1) Emergency temporary authority should be applied for only where emergency conditions exist which do not permit sufficient time to afford the notice specified in § 1131.3(a). Applications for emergency temporary authority must be filed on Form BOR-95 (§ 1003.1 of this chapter).

(2) Where the emergency is found to continue beyond the period of the initial grant, the emergency temporary authority may be extended only upon written request until disposition is made of the longer term temporary authority application.

(3) In the cases where the urgency of the situation warrants, the supporting statements of those having the immediate and urgent need for carrier service may be furnished by telegram. However, such telegram must contain substantially the federal information which is more fully described in paragraph (c) of this section. The telegram must be sent to the Bureau of Operations' field staff member who is handling the application.

(4) In processing emergency temporary authority applications, it often becomes necessary to use telephone and telegraph service to verify rate levels and the absence of existing carriers' service, and to submit the Bureau of Operations' field report to the Temporary Authorities Board in Washington, D.C. As Government funds are not available to pay such communication expenses, the applicant must have or make arrangements with the telephone and telegraph companies so that such costs can be charged to its account.

(e) *Insurance and service of process.* (1) Where the applicant is an authorized carrier, a statement must accompany the application indicating whether evidence of effective insurance is on file with the Commission and whether agents for service of process have been designated for each State in which operations are conducted

or proposed. If applicant is not an authorized carrier, it should furnish a statement containing the name of its insurance company, its policy number, the effective and expiration dates of such policy, the limits contained therein, and a copy of the Commission's Form BOC 3 (§ 1003.1 of this chapter) designating an agent for service of process in each State where operations are proposed to be conducted. If such carrier does not have appropriate insurance it may submit a statement, which includes the name of its insurance company and of its intent to effect compliance before commencing operations if the authority is granted.

(2) On emergency temporary authorities where time does not permit the submission of the required written statement by applicant, a telegraphic statement may be accepted.

§ 1131.3 Processing of applications.

(a) ***Notice to interested persons***—(1) *Service.* Notice of the filing of temporary authority applications tendered shall be given by the publication of a summary of the authority sought in the FEDERAL REGISTER, except that no such summary will be published in the case of emergency temporary authority applications. Such summaries will be prepared by the appropriate Bureau of Operations supervisor and forwarded to the Office of Proceedings, Washintgon, D.C.

(2) ***Filing of protests.*** Any interested persons who can and will provide all or any part of the proposed service may file a protest against the application. Such protest must be specific as to the service which such protestant can and will offer and must consist of a signed original and six (6) copies which must be filed with the district supervisor named in the FEDERAL REGISTER publication within 15 calendar days after the date notice of the filing of the application is published in the FEDERAL REGISTER. One copy of such protest must be served on

the applicant or its authorized representative, if any, by U.S. mail or in person.

(b) *Publication of rates and charges.* A carrier may not lawfully perform transportation under a grant of temporary authority unless and until compliance has been made with the rate and other requirements of section 217 of the Interstate Commerce Act in the case of common carriers and of section 218 of the act in the case of contract carriers, as provided in § 1131.5.

(c) *Revocation for noncompliance, and reinstatement and extension of time for making compliance.* (1) Temporary authority is approved subject to compliance within 30 days, or within such additional time as the Commission may approve, with the applicable provisions of the statute and the requirements, rules, and regulations prescribed by the Commission thereunder governing the filing of rate and contract publications, the filing of acceptable evidence of security for the protection of the public and designation of agents for service of process.

(2) If compliance is not made within the 30-day period, or within the time allowed in any extension thereof applicant will be notified that the temporary authority order is of no further force and effect. Where this occurs, applicant may make written request for reinstatement of the granting order if it so desires, provided (i) that such request is made within 20 days from the date of the notice, (ii) that good cause can be shown as to why compliance was not made within the time allowed, and (iii) that the request for reinstatement contains positive assurance that applicant is now able to and will comply immediately with all applicable requirements, if the order is reinstated.

§ 1131.4 Determination of applications.

(a) *General.* (1) Initial determination of temporary authority applications will be made by the Commission's

Temporary Authorities Board or by Division 1 of the Commission, acting initially. For purposes of administration, distinctions in the applicable grounds of approval and rate filings will be maintained as between temporary authority of not more than 30 days (ETA), and temporary authority of up to 180 days (TA). No successive grants of temporary authority shall exceed a total of 180 days, and, if a grant of an emergency authority results in a total aggregate temporary authority grants of more than 180 consecutive days, such total, to the extent that it exceeds 180 days, will be reduced accordingly.

(2) While a grant of temporary authority is neither a permit nor a certificate under the Interstate Commerce Act it nevertheless enables the applicant to provide service either as a common or a contract carrier, as the case may be. Consequently, an applicant for temporary authority to operate as a motor contract carrier must show that the operation proposed is that of a contract carrier by motor vehicle as defined in section 203(a)(15) of the Interstate Commerce Act; that is, that the applicant serves one or a limited number of shippers, and that the service proposed involves either the assignment of vehicles to the supporting shipper's exclusive use or the provision of a transportation service designed to meet the distinct needs of that shipper. No "dual operation" finding is necessary, however, where a grant of temporary authority to operate as a contract carrier is made to an existing common carrier and vice versa.

(3) Since a grant of temporary authority is not a permit or certificate, none of the related rights, under the Interstate Commerce Act, such as the incidental charter rights of passenger carriers and the implied authority to perform terminal services at points within the commercial zone but beyond the corporate limits of named municipalities, is applicable. Temporary authority may not be tacked or joined with permanent authority held by the carrier for the purpose of performing through

transportation, nor can through, joint-line service be performed thereunder. Where there is a need for such services which are not implicit in grants of temporary operating authority this fact should be stated specifically so that an appropriate authority description may be issued.

(4) For administrative convenience, temporary authority to transport property will be considered to authorize the return transportation of shipper-owned trailers and of empty crates, barrels, bottles, hangers, pallets, bracing, dunnage, and other similar containers and shipping devices used in the outbound transportation covered by the temporary authority.

(b) *Standards for determination.* The following standards shall be used by the Temporary Authorities Board, and by Division 1 of the Commission acting initially or in an appellate capacity, in the absence of special or unusual circumstances, in the determination under section 210a(a) of the Interstate Commerce Act (49 U.S.C. 310a (a)) of applications for temporary authority.

(1) *General.* (i) Grants of temporary authority shall only be made upon the establishment of an immediate and urgent need for the transportation of passengers, or of particular commodities or classes of commodities, from specified origin points or areas to specified destination points or areas, having no carrier service capable of meeting such needs. Requests for temporary authority involving service to or from entire States, counties, or other defined areas will warrant approval only when supported by evidence that there is a compelling need for service to or from a representative number of points in each such State, county, or area, that there is a reasonable certainty that such service will be utilized, and that there is no carrier service available capable of meeting such need. Otherwise, such grants will be limited in accordance with the evidence to point-to-point authorizations covering the immediate and urgent need for service.

(ii) Any need which is the basis of an operation authorized by a temporary authority to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a "continuing nature" unless the Commission otherwise expressly determines. If the need for a particular service ceases and a temporary authority covering such need expires or is revoked, and a new or separate need arises subsequent to such expiration or revocation, additional temporary authority for the 180-day aggregate, or for a shorter period, may be granted to the same carrier for the service, notwithstanding the prior grant or grants. However, an application filed after an aggregate of 180 days temporary authority has expired or been revoked will be denied unless the facts clearly show that the application is in reality based on a new need and not a continuation of the need on which the prior grant of authority was based.

(2) *Immediate and urgent need.* An immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, a failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed.

(3) *Emergency temporary authority.* An immediate and urgent need justifying a grant of emergency temporary authority will be determined to exist only where it is established that existing carrier service is not capable of providing transportation service to meet immediate and actual emergencies, such as, for example, to prevent a plant shutdown, to move particular shipments in the

interest of the national defense, to meet needs resulting from fires, floods, storms, or other disasters which affect the public health, safety, and welfare, disruption in existing carrier services by work stoppages, unexpected cessation of existing transportation service, lack of equipment capable of transporting the involved commodity, failure or lack of storage facilities and imminent spoilage of perishable commodities, or comparable situations which make it impracticable to afford the notice specified in § 1131.3 (a).

(4) *Single-line service.* Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved.

(5) *Complete service.* Requests for temporary authority on the basis of "providing a complete service to a shipper," even though existing carriers are participating in the traffic and in many instances can provide a substantial part of the service, require special justification. Generally, in such instances, the applicant must establish with reasonable certainty that the existing carriers cannot adequately serve the shipper in their authorized territories, or that the supporting shipper has revised its distribution methods to such an extent that there actually is an immediate and urgent need for the complete service proposed.

(6) *Failure to provide equipment.* Temporary authority may be granted where existing authorized carriers are unable or refuse to furnish equipment necessary to

move passengers or the traffic of shippers in order to meet an immediate and urgent transportation need.

(7) *Alternate routes.* Except in unusual circumstances, temporary authority to operate over an alternate route will not be granted, even though the service route may be circuitous, since the carrier-applicant may now operate between the points involved.

(8) *General bases for disapproval.* Applications for temporary authority may be denied for the following reasons:

(i) Failure to meet statutory standards.

(ii) Unfitness of the applicant.

§ 1131.5 Rates, charges, and special permission applications.

(a) Rates requirements generally.

(1) *Motor common carriers.* A motor common carrier may not lawfully perform transportation until effective rates and provisions are published, posted, and filed with the Commission as required by section 217 of the Interstate Commerce Act and the Commission's rules and regulations issued thereunder. Rates to be established upon less than thirty days' notice must not be less than existing motor common carrier commodity rates on the same commodities in like quantities from and to the same points, or in absence thereof not less than the motor common carrier commodity rates in the same commodities in like quantities from and to nearby points for similar distances. In the absence of exiting motor common carrier commodity rates, the rates to be established on less than thirty days' notice shall not be less than the applicable motor common carrier class rates from and to the same points except as otherwise authorized in paragraph (b) of this section. Detailed instructions on rate filings may be obtained from any Bureau of Operations' field office.

(2) *Motor contract carriers.* A motor contract carrier may not lawfully provide transportation until executed transportation contracts, when required, and schedules of rates and charges are on file with the Commission as required by section 218 of the Interstate Commerce Act and the Commission's rules and regulations issued thereunder. The filing of contracts covering transportation of passengers, currency, bullion, and certain other valuable articles is not required. Except as otherwise authorized in paragraph (b) of this section, the rates proposed to be established upon less than thirty days' notice shall not be lower than permitted under subparagraph (1) of this paragraph if applicant were a common carrier, except that if any of the points of origin, destination, or territory to be served is at the time served by a contract carrier transporting the same commodities, the rates and charges may be made on the same or higher basis as those of such contract carrier, or those maintained by applicant between other points in the same area.

(3) *Notice of rate publication required.* In most cases there is outstanding special permission authority to publish rates on less than statutory notice covering transportation service by and for the Railway Express Agency and the substitution of motor for rail service. Most tariff publishing agents also have outstanding special permission authority to publish on short-notice scope of operating rights to be granted pursuant to a temporary authority application and to add new participating carriers to their tariffs. The temporary authority application must state who will make the tariff publication, and whether it is to be made on thirty days' notice or upon less than thirty days' notice.

(4) *Special permission applications.* (i) If publication is to be made on short notice by the carrier filing the temporary authority application and it is not covered by the outstanding special permission authority referred to in paragraph (b) (1) of this section, such temporary

authority application must be accompanied by a special permission application (four copies with original signed and notarized), setting forth the proposed rates clearly and completely. An accompanying exhibit may be used if identified by letter, such as Exhibit "A", and so referred to in the application. If the proposed provisions consist of rates, all points of origin and destination must be shown or definitely indicated. If permission is sought to establish a rule, the exact wording of the proposed rule must be shown. If relief from tariff circular rules is sought, the exact form of publication must be shown.

(ii) The special permission application must contain the names of motor carriers known to maintain competitive rates; charges, or rules between the same points or points related thereto, together with adequate identification of tariffs containing such rates, charges, or rules. It must also state whether such carriers have been advised of the proposed rates, charges, or rules and whether they have been advised that it is proposed to establish such provisions on less than thirty days' notice. The rates, charges, or rules proposed to be established should conform to the competitive rate level standards of subparagraph (1) of this paragraph for motor common carriers or subparagraph (2) of this paragraph for motor contract carriers. In the absence of effective commodity rates via competing carriers on the commodity or commodities to be transported, the Special Permission Board, upon a proper showing, may authorize the establishment of rates on a different level.

(b) *Emergency temporary authority.* (1) *Property carrier.* Each application for emergency temporary authority for 30 days or less, except those involving the Railway Express Agency or substitution of motor for rail service, shall be accompanied by a statement of the rates, charges, and rules to be filed under Special Permission M-60160 and M-60161, §§ 1307.100, 1307.101 of this chapter, for use in the event the authority sought is

granted. Such statement shall contain the names of competing motor carriers transporting the same commodities and the rates of such carriers between the same points or from or to nearby points for similar distances and the application will not be acted upon until such statement shall have been furnished by the applicant to the district supervisor.

(2) *Existing rates.* If the statement of the proposed rates submitted with the emergency temporary authority application contains rates or charges lower than existing rates described under paragraphs (a) (1) or (2) of this section by the named or other carriers, approval will not be recommended or authority granted. All emergency temporary authority will be expressly conditioned on establishing rates or charges no lower than those set forth in the application, and a "W" tariff naming rates lower than those set forth in the application will be rejected. Emergency temporary authority will be revoked for failure to seasonably file a proper "W" tariff.

(3) *Suspended or special permission rates.* (i) In every case the carrier shall state in its emergency authority application whether there is under suspension at the time any rates published for its account, or whether an application for special permission authority to file its rates on less than 30 days' notice has been granted or denied, covering the same traffic from and to the same points in connection with another temporary or permanent authority application. If the applicant has rates or other tariff matter under suspension, or has received or been denied special permission to file on less than 30 days' notice any rates not yet effective, covering the same traffic, the district supervisor will not recommend approval of the request nor will a grant be made of the emergency temporary authority.

(ii) If applicant carrier has rates under suspension covering the same traffic, it should file a special permission application as set forth in paragraph (a) (4) of this

section, stating a copy was served upon protestant(s) and requesting short notice authority to cancel the suspended matter and to file rates according to paragraphs (a) (1) or (2) of this section or, in the alternative, state that the suspended rates will be defended and request short notice authority to file rates conforming with paragraphs (a) (1) or (2) of this section to apply during the suspension period, such rates to expire at the end of the suspension period.

(4) *Passenger carriers.* (i) Each application for emergency temporary authority must be accompanied by an application for special permission to publish fares and charges in connection therewith if they are proposed to be made effective on less than 30 days' statutory notice. Such application shall be accompanied by a statement of the fares, charges, and rules to be filed if the authority is granted. Authority to file fares and charges on less-than-statutory notice will be granted only when the proposed fares and charges are on a level which does not undercut or disrupt the existing level of the fares and charges between the points involved maintained by competing motor carriers generally in the same territory.

(ii) The special permission application must contain the names of motor carriers known to maintain competitive fares, charges, or rules between the same or related points, together with accurate identification of the tariffs by I.C.C. numbers, containing such fares, charges, and rules. It must also state whether such competing carriers have been advised of the fares and charges proposed to be established upon less-than-statutory notice.

§ 1131.6 Petitions.

(a) *Petitions for reconsideration.* Pursuant to and in accordance with the Commission's General and Special Rules of Practice, petitions for reconsideration of orders of (1) the Temporary Authorities Board, and (2) Division 1 initially granting or denying temporary authority

in proceedings not subject to prior determination by the Temporary Authorities Board, may be filed by any interested person.

(b) *Replies.* Replies may be filed by any interested person to such petitions; but if the facts stated in any such petition disclose a need for accelerated action, such action, in the discretion of the Commission, may be taken before expiration of the time allowed for reply. Replies received after accelerated action on petition will be treated as petitions for reconsideration of the accelerated action and given corresponding accelerated action.

(c) *Petitions for reconsideration.* The filing of a petition for reconsideration of an order of Division 1 or the Temporary Authorities Board does not have the effect of automatically staying such order, and the grantee carrier may conduct the operations authorized by such order upon compliance with its tariff, insurance, and other requirements for the duration of the temporary authority, or until otherwise ordered.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 369

AMERICAN FARM LINES, *Appellant*,

v.

BLACK BALL FREIGHT SERVICE, ET AL., *Appellees*.

No. 382

INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

BLACK BALL FREIGHT SERVICE, ET AL., *Appellees*.

On Appeal From the United States District Court for the Western District of Washington

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REPLY BRIEF OF APPELLANT AMERICAN FARM LINES

The briefs filed by the carrier appellees[1] clearly demonstrate a fundamental divergence of view between these appellees and appellant American Farm

[1] Four separate briefs were filed by these appellees. The Brief of Appellees Consolidated Freightways Corp., et al. will be cited "CF Br."; the Brief of Certain Motor Carrier Appellees, filed on behalf of the American Trucking Associations, Inc. and 23 carriers will be cited "ATA Br." The briefs filed by the Railroad Appellees and by Dealers Transit, Inc. and United Transports, Inc. are not cited in this Reply Brief.

Lines ("AFL") as to the nature and significance of this case.

As appellees paint the background, AFL is simply an unrepentant renegade, "masquerading" as a legitimate farm cooperative, and operating in the "gray area" of "unregulated, illegal and destructive" motor transportation (ATA Br., p. 5). Its operations, they contend, have "posed a most serious threat" to the system of regulated common carriers. (CF Br., p. 5) One senses from reading these briefs that the regulated carriers view AFL's application to become a regulated common carrier as the ultimate impertinence.

In AFL's view, the service it has provided to the Government within the scope of its exemption has not only offered a measure of very healthy competition for the regulated carriers in both rates and services, but has demonstrated the capacity of the motor transportation system for substantially improved performance. The Department of Defense concurs with this view. (A. 14a)[2] On the record before the ICC, AFC was clearly entitled to be certificated.

Of course, this Court is called upon to decide this case on the basis of the rather narrow procedural issues presented on these appeals, and not upon the

[2] The Department of Defense strongly opposed the 1968 legislation amending 203(b)(5) of the Interstate Commerce Act to restrict the nonmember transportation operations of agricultural cooperatives. In commenting on the original version of S. 752, which would have limited nonmember operations solely to the carriage of "farm-related" freight, the Department said that such a severe restriction "would remove an effective element of price and service competition and thus deprive the Department of Defense of a source of efficient and low-cost transportation for freight shipments. As a result, budgetary requirements of the Department of Defense would be increased." S. Rep. No. 1152, 90th Cong., 2d Sess. 29 (1968).

parties' characterizations of one another. There is no issue before the Court as to the lawfulness of AFL's prior operations or its fitness to hold common carrier authority, and the Court need not consider whether AFL poses a "serious threat" to the regulated carriers or whether additional competition would be desirable among carriers serving the Government. These issues will all be argued in the pending ICC proceeding involving AFL's application for permanent authority, and will be decided by the ICC in that case on the basis of an extensive hearing record.[3]

There is a danger, however, that argument on the procedural issues in these appeals will obscure the fact that the conflict over AFL's temporary authority is simply a small part of the larger conflict relating to the permanent entry of AFL, as a regulated carrier, into the Government market. This fact is particularly important to keep in mind in weighing appellees' arguments that they were not fairly informed of the complaints against their service and that the superiority of AFL's direct single-line service over the joint-line regular route service of existing carriers was not proved and is only "theoretically possible." (CF Br., p. 49) As we shall demonstrate below, when these arguments are viewed in their broader context, and measured against flatly inconsistent statements made to the ICC by many of these same carriers, it is clear beyond question that there is no genuine dispute among the parties either as to the Government's need for the type

[3] The hearing on AFL's application for permanent authority was completed January 15, 1970. The transcript of the 12-day hearing covers 1,809 pages. One hundred fifty-six documentary exhibits and the testimony of 68 witnesses were presented by the 67 parties that appeared.

of service AFL has been providing or as to the inability of the regulated carriers to meet that need under their present operating authorities. The only dispute is whether a new competitor—specifically AFL—should be certificated either temporarily or permanently to serve this need.

I. There Is No Real Dispute Among the Parties as to the Government's Substantial Need for Improved Service

Appellees' principal attack on the substance of the evidence offered in support of AFL's application reduces to the contention that the Defense Department's 22-page sworn statement of support contained too many generalities as to the Department's needs and not enough specific information about "service failures" by existing carriers. The somewhat condescending conclusion appellees draw from their analysis of the evidence is that the Defense Department's support of AFL was merely "an undifferentiated plea for more efficient overall service." (CF Br., p. 47)[4] Appellees dismiss as being only "theoretically possible"

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[4] This conclusion is directly inconsistent with the more forthright conclusions these same appellees drew in their submissions to the ICC. The Defense Department's statements to the ICC made clear that it was seeking not simply more "efficient" service, but also *lower cost* service. (A. 14a, 204a) Indeed, appellees were explicitly informed by the Department that one reason for its support for AFL was that AFL's service had "resulted in significantly reduced rates." (A. 140a)

Consolidated Freightways and Tri-State Motor Transit Co., two of the largest transcontinental munitions carriers, as well as other carriers, expressly interpreted the Department's support as motivated by a desire for lower rates, and plainly viewed AFL as a threat to the existing rate structure. (A. 54a-55a, 58a-59a, 124a) Notwithstanding these carriers' claims of "destructive" competition from AFL, the record is noticeably devoid of any evidence to support such conclusory charges.

AFL's observation that direct single-line service will obviously be faster than circuitous multiple-line service. In any event, they suggest, the difference in speed "is not to be measured in large blocks of time." (CF Br., p. 49)

AFL respectfully submits that these representations by appellees to this Court are utterly without merit, and are directly contradicted by representations these same carriers have made to the Interstate Commerce Commission in proceedings arising out of this very conflict.

As the American Trucking Associations, Inc., has informed this Court, after the Defense Department supported AFL's application over 125 regulated carriers filed applications for similar "improved operating rights," many with precisely the same type of support from the Department of Defense.[5] Each of these applications was filed under the sworn representation "that the application is made in good faith, with the intention of presenting evidence in support thereof in every particular."[6] It must be assumed, in view of these representations, that these carriers had no ulterior or improper motives in filing such applications and that each in fact believed that a need existed for the authority it sought.

Typical of the applications that were triggered by AFL's application is that of appellee Consolidated

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[5] Motion to Affirm, p. 8 n. 22. According to recent testimony by a Defense Department witness in AFL's permanent authority case, as of January 1970 more than 170 carriers have requested the Department's support for such applications.

[6] ICC Form OP-OR-9, "Application for Motor Carrier Certificate or Permit", p. 4. 2 CCH Fed. Carr. Rep. ¶ 24078, at 24551.

Freightways Corp. of Delaware, in Docket No. MC 42487 (Sub-No. 705). By this application, Consolidated sought authority to provide direct single-line carriage of explosives between all points in 41 states (including all states covered by AFL's application) so long as the freight was moving to or from a U. S. military installation. In support of Consolidated, the Defense Department made substantially the same representations as it did in AFL's case as to its need for the faster transit times that can be achieved through direct single-line service.

The most significant representations, however, were made by Mr. Don L. Roark, General Manager of the Division established by Consolidated to specialize in Government traffic.[7] While Consolidated has argued to this Court that it is only "theoretically possible" for direct single-line service to move commodities faster than joint-line regular-route service (CF Br., pp. 49-50), Mr. Roark, on behalf of Consolidated, expressed a quite different view to the ICC. For example, he points out that substantial delays may be experienced in joint-line operations:

> Wherever it is necessary to effect a trailer interchange, the possibility and even probability of delay arises because of the difficulties of coordinating supply and availability of tractor equipment between two carriers. . . . We find that this frequently happens in trailer interchange arrangements, despite the efforts of participating carriers

[7] Verified Statement of Don L. Roark, Docket No. MC 42487 (Sub-No. 705) (hereinafter cited "Roark Statement"). This statement, as well as a large number of applications and statements by other carriers, were admitted in evidence in AFL's permanent application case.

> to cooperate and coordinate their activities. In addition to this type of delay, there is also time required for inspection of equipment and preparation of required inspection reports, equipment receipts, et cetera. If our inspection indicates that the equipment is not roadworthy and in proper condition for transportation of explosives, there can be still further delays in seeing that necessary repairs are effected.[8]

The direct inconsistency in Consolidated's representations concerning circuitous routing is equally glaring. In their brief in this Court they deny that transit times are seriously affected by circuitous routings because "between major shipping points there are generally only a few highways that are feasible alternative routes, and generally regular route carriers are authorized to move over those highways (*see, e.g.*, A. 335a)"[9] (CF Br., p. 50.) Yet in support of its own application, Consolidated represented to the ICC that

> If our Arrowhead Division had direct authority from the origins of explosives traffic such as McAlester, Oklahoma to points of destination such as Bangor and Port Chicago, in my opinion, we could considerably shorten transit times involved. We could operate over more direct routes, and perform a more efficient service in all respects.[10]

In support of this contention, Mr. Roark cited an exhibit sponsored by another Consolidated witness show-

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[8] Roark Statement, pp. 13-14.

[9] Page 335a of the Appendix has nothing at all to do with the proposition for which it is cited.

[10] Roark Statement, p. 15.

ing that a grant of direct single-line authority to Consolidated

> would mean potential annual savings in excess of 10,000,000 ton-miles on explosives transportation performed for the Department of Defense.[11]

He then set forth specific examples of Consolidated's present regular routings that involved circuity ranging from 15 to 28 percent in excess of "the most direct available routes."[12]

Finally, in a crescendo of enthusiasm, Mr. Roark testified as follows:[13]

> We at CF are aware of the needs expressed by the DOD for fast, efficient service in the movement of ammunition and explosives in the nation's defense effort. . . . The nature of this specialized traffic makes irregular route type authority essential to the best service performance. The nature of the traffic, its peculiar service demands, and considerations of safety all make direct single-carrier service and avoidance of interchange important.
>
> By shortening our routes of travel and eliminating time-consuming, expensive interchange, we not only will be able to operate at lower cost but will be able to keep our equipment on line and

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[11] *Id.* The exhibit referred to by Mr. Roark showed that Consolidated could realize mileage reductions ranging up to 633 miles. Verified Statement of Edward V. Taylor, App. N, Docket No. MC 42487 (Sub-No. 705). The Defense Department's statement in support of Consolidated showed that the savings in transit times that could be achieved would range up to 36 hours. Verified Statement of George William Baude, App. 1, Docket No. MC 42487 (Sub-No. 705).

[12] *Id.*, pp. 15-16.

[13] *Id.*, pp. 16-17.

> maintain closer control over maintenance of that equipment. We could improve our overall transit time performance by eliminating many hours of delay at interchange points and many hours, even days, of road time. It is for these reasons that we ask the Commission to grant us the authority we seek.

Statements comparable to those of Consolidated have been made to the ICC in other application proceedings by a large number of the appellees in this case.[14] Appellee IML Freight, Inc., for example, seeking direct single-line authority throughout a 26-state area (including most of the states covered by AFL's application), catalogued as "some of the benefits that will inure to the shipping public": avoidance of "delays at interline interchange points;" shortening of transit times "by utilizing direct shorter routes;" and "savings and economies to the carriers which can ultimately be passed on to the shipping public." Such savings, IML stated, "will enable us to compete with the Farm Co-Ops presently being used by the Government . . . ."[15]

Finally, while appellees quibble with AFL's observation that it is a "rather obvious proposition that direct single-line service is faster and safer . . . than circuitous multiple line service" (CF Br., p. 49), appellee Navajo Freight Lines, Inc., in sworn testimony filed with the ICC only one week prior to the noting

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[14] In Appendix A hereto we have identified a number of applications by appellee carriers that have been supported by the Defense Department on grounds substantially identical to those in this case. This listing is not intended to be exhaustive.

[15] Verified Statement of Lynn Davis, General Traffic Manager of IML Freight, Inc. at pp. 8-9, filed in Docket MC-33641 (Sub-No. 80).

of probable jurisdiction by this Court in this case, made exactly the same observation:[16]

> We believe it is self evident that an irregular route single-line service would accomplish substantial savings in delivery time and mileage traversed. The result in savings would be of benefit to Navajo, to the Department of Defense and to this nation's transportation system generally. In addition, the factor of public safety would be enhanced.

We respectfully submit that these statements, which are grossly inconsistent with appellees' position here, clearly show (a) that there is no real dispute among these parties as to the Government's need for direct single-line service, and (b) that such service is not generally available from existing carriers.[17] Statements to this Court by appellees professing ignorance of the Government's need—such as ATA's assertion that "Existing motor carriers know of no service problems justifying the grant of authority made" (ATA Br., p. 15)—are somewhat less than candid. The existing motor carriers have clearly recognized the Government's need for the direct single-line service that AFL has been providing. In their broad-scale effort to prevent AFL's entry into this market they have, in effect, waived their objections based upon lack

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[16] Verified Statement of David N. Inwood, Vice President—Traffic, Navajo Freight Lines, Inc., pp. 5-6, Docket No. MC-76032 (Sub-No. 240).

[17] It is significant that none of the briefs filed by appellees discusses AFL's exhibits analyzing the routings available to the Government from the leading munitions carriers. These exhibits, which are referred to at page 38 of AFL's main brief, showed that single-line service was available on only 4% of more than 2,000 available routes.

of need. They have elected to defend against AFL by attempting to persuade the ICC to expand their own authorities rather than certificating a new carrier.[18]

II. Appellees' Claims of Prejudice Are Wholly Without Merit

In wounded and indignant tones, appellees argue to this Court that they were seriously prejudiced because the Defense Department did not give specific details concerning "service failures." Had specifics been given, they suggest, they would have been able to show that the Department does not in fact have the kind of need it claims to have, or, at least, "that existing carriers are able to meet it." (CF Br., pp. 29, 32-33, 35; ATA Br., pp. 15, 22.) AFL respectfully submits that these arguments are pure and simple afterthought.

In assessing these arguments, it is important to keep in mind the purpose of the specific ICC rules that the district court found to have been violated. As appellees state (CF Br., p. 20), the purpose of that portion of the ICC's temporary authority rules relating to the content of supporting-shipper statements, 49 C.F.R. § 1131.2(c), is to "insure the disclosure of information relevant to the statutory standards".

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[18] This is made clear in the application of appellee Navajo, referred to above. Navajo stated:

> We are aware that the Department of Defense is currently supporting not only Navajo but numerous other carriers and non-carriers for broad extensions of operating authority to serve DOD transportation requirements on a point to point single-line basis over the shortest available routes. It is our belief that the carriers chosen to receive such authority should be experienced, reliable carriers with broadly based operations.

Verified Statement of David N. Inwood, p. 3, Docket No. MC-76032 (Sub-No. 240).

There are two standards set forth in section 210a of the Interstate Commerce Act, 49 U.S.C. § 310a, for granting temporary authority: First, the shipper must have an immediate and urgent need for the proposed service; second, the proposed service must be unavailable from existing carriers.

Subsections (8) and (9) of the rules, the specific sections in issue on these appeals, have a very limited purpose: They deal only with the availability of the proposed service from carriers other than the applicant. They do not bear at all on the question of the shipper's need for the proposed service or the immediacy or urgency of that need. Information relating to the "need" standard is covered by subsections (1) through (7).

It is clear, therefore, that appellees state the case too broadly when they contend that the alleged violation of subsections (8) and (9) prejudiced their ability to contest the Department's assertion of an immediate and urgent need. At worst, a failure to provide the information required by these subsections could only prejudice their ability to contest the Department's assertions relating to the unavailability of the proposed service from existing carriers. Thus, the critical question in determining whether appellees were prejudiced is whether the Department's statement provided sufficient information to enable appellees to show that they were able to provide the proposed service.

We submit that appellees could not conceivably have had any uncertainty as to the contentions they had to meet, or any misapprehension as to the nature of the Department's criticism of the existing pattern of motor carrier authority. On at least three occasions in this

record the Department made clear that its support for AFL was premised not upon "service failures," but upon the Department's desire to upgrade the quality and reduce the cost of the motor transportation service available to it through the certification of direct single-line service.[19] The Department also made clear on these occasions that AFL, in operations under its exemption, had demonstrated the superiority of direct single-line service, and that the immediacy and urgency of its need for certification of AFL's service was occasioned by the passage of legislation restricting AFL's exemption and by the entry of injunctions against AFL.[20]

Appellees' awareness that these were the premises of the Department's support for AFL's application is evidenced by their own concurrent applications for similar authority.[21] Each of these applications was based upon the Defense Department's need for improved service, and each was supported by the Department on grounds substantially identical to those on which AFL's application was supported. For these

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[19] This position was first stated in the Department's letter to the ICC in May 1968 informing the Commission of its support for AFL. (A. 14a) It was reiterated in June 1968 by an Assistant Secretary of Defense in rejecting ATA's request that the Department retract its support for AFL. (A. 139a) Finally, it was spelled out at length in the sworn statement of support filed after the ICC reopened the record. (A. 194a, 209a)

[20] As we have noted, discontinuance of an existing service is one of the grounds set forth in ICC regulations as justifying a grant of temporary authority. 49 C.F.R. § 1131.4(b)(2).

[21] Consolidated's application, to which we referred above, was filed with the ICC on November 24, 1968—only four days after the Defense Department filed its final statement of support for AFL in this case. 33 Fed. Reg. 18461. Other similar applications were filed in May and September 1968, prior even to the reopening of the record by the ICC. See Appendix A.

carriers now to suggest that the Department's statements in this case did not provide sufficient detail to enable them to defend themselves is sheer nonsense.

The problem appellees were faced with in this case was *not* a lack of specific detail in the evidence against them. Their problem was that in choosing to pursue fundamentally inconsistent courses before the ICC they had to contradict evidence that they themselves were relying on in other proceedings.

III. Appellees' Concept of an "Indivisible" Jurisdiction Is Inapposite in This Case

Appellees's argument that the ICC lost jurisdiction to reconsider or reopen the case before it once the complaint was filed in the court below is based upon a concept of "indivisible" jurisdiction that has no application whatsoever to the facts of this case.

At the outset we note that the briefs filed by appellees completely fail to mention the principal case relied upon by AFL—this Court's decision in *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290 (1923). That case clearly established the principle that the jurisdiction of a district court may be invoked prior to the completion of an administrative proceeding in order to obtain interlocutory relief from an agency order that is about to take effect.[22] Appellees frankly concede that it was the ICC's refusal to stay its grant of

[22] Neither do appellees mention the other cases cited by AFL (Br., pp. 44-45) showing that it is an established procedure in ICC cases for parties before the Commission to seek anticipatory judicial relief pending final action on the merits by the Commission. The procedure is established with respect to other agencies, as well. *See West Indian Fruit & S.S. Co.* v. *Seatrain Lines*, 170 F.2d 775 (2d Cir. 1948), *cert. denied*, 336 U.S. 908 (1949) (temporary injunction granted enjoining effectiveness of rate pending action by Federal Maritime Commission on complaint before it).

authority to AFL pending action on their petitions for reconsideration that caused them to seek relief from the court below (CF Br., p. 11), and notwithstanding their elaborate efforts at *post hoc* rationalization,[23] the record shows that they clearly understood that the administrative proceeding had *not* been completed when they sought a stay from the district court. Thus, this case plainly presented a situation in which a "divisible" jurisdiction has long been recognized.[24]

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[23] The suggestion in the CF Brief (p. 60, n. 29) that the petitions for reconsideration were merely "precautionary"—that is, were filed simply to guard against an argument by AFL that they were *required* to be filed—is a masterpiece of afterthought. There is not the slightest suggestion in these petitions that the petitioners believed their petitions to be either unauthorized or unnecessary.

Indeed, the first time the contention that the petitions were unauthorized appears to have been asserted was in the Supplemental Complaint filed in the court below on December 31, 1968—*after* the ICC had reopened the proceeding and granted new temporary authority to AFL. The Supplemental Complaint does *not* allege that the petitions were "precautionary," as appellees intimate here, but that they were filed "under the erroneous assumption" they were authorized. (A. 373a.)

ATA's assertion that after the complaint was filed "Appellees remained steadfast in their conviction that the court assumed exclusive jurisdiction" (ATA Br., p. 25), is belied by its own pleadings before the ICC. In its motion to vacate the Commission's order of November 5, 1968 reopening the record, ATA expressly pointed out that the petitions for reconsideration "are presently pending before the Commission." (A. 172a). That motion makes not the slightest mention of what ATA now claims was an "exclusive jurisdiction" in the court.

[24] The "divisible" jurisdiction of a reviewing court has been recognized in other areas. As we pointed out in our main brief (p. 46) it has been held that the Federal Communications Commission may entertain petitions for reconsideration notwithstanding the fact that nonpetitioning parties have already sought judicial review on the merits. *Wrather-Alvarez Broadcasting, Inc.* v. *FCC*, 248 F. 2d 646 (D.C. Cir. 1957). None of the appellees discusses this case.

Moreover, even if the "exclusive jurisdiction" analysis is to be taken seriously, one still must pinpoint the mystical moment at which jurisdiction "passes" from agency to court. As the *Oklahoma Natural Gas* case makes plain, that moment is *not* at the filing of a complaint in the district court—at least when proceedings before the agency have not been completed. If analogy is to be drawn to review proceedings involving other administrative agencies, as appellees argue (CF Br., pp. 53-54), then the critical event should be the filing of the record. Although appellees cite *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939) for the proposition that the agency must obtain permission of the reviewing court to reopen the administrative proceeding, that case in fact involved a reopening *after* the record had been filed in court. This Court expressly recognized there that the agency retained authority to modify its order *until* the record was filed. 305 U.S. at 368.

If, as appellees intimate (ATA Br., pp. 15-16), the evil to be avoided in a situation such as this is action by the agency that is "inconsistent" with the court's jurisdiction, that purpose is clearly served by terminating the agency's authority to reopen when the record is filed in court. This Court has stated that "findings of the [Interstate Commerce] Commission may not be assailed upon appeal in the absence of the evidence upon which they were made." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286 (1934). Thus, since the reviewing court cannot address itself to the merits of the agency decision until the record is before it, there is clearly no opportunity for inconsistent action by the agency prior to that time. As we have already noted, the agency record in

this case was not filed in the district court for more than a month *following* the ICC's decision on the reopened record.[25]

Finally, the "prejudice" appellees claim to have suffered by reason of the ICC's reopening of the record without leave of court is highly speculative, to say the least. It consists of the mere possibility that the court might have denied reopening or imposed "safeguards" on the ground that the ICC was wrongfully attempting to "shore up its position in court." (CF Br., p. 47)

There are two difficulties with this ingenious afterthought. First, when the Commission moved the district court to stay its proceedings pending reopening of the case before the ICC (A. 167a), appellees raised none of these contentions. Their 14-page brief in opposition (R. 108) argued only that the court had jurisdiction and the ICC did not. It apparently did not occur to appellees at that time that the ICC was attempting to "shore up its position," or that "safeguards" were needed. Nor did it occur to appellees

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[25] This case clearly did not involve any such procedural inconsistency or inconvenience as was presented in *Arrow Transp. Co.* v. *United States*, 176 F.Supp. 411 (N.D. Ala. 1959), *aff'd*, 361 U.S. 353 (1960) (hearings before court and ICC scheduled 7 days apart), or *Atchison, T. & S.F. Ry.* v. *United States*, 231 F.Supp. 422, 426 (N.D. Ill. 1964) (briefing and hearing schedule fixed by court prior to reopening by ICC).

No dates for the filing of briefs or for hearing the case on the merits had been fixed at the time the ICC reopened its proceeding. Indeed, most of the appellees were not even parties to the case at the time the Commission reopened. The railroads did not intervene until November 14, 1968; Yellow Freight intervened on January 6, 1969; Tri-State and Consolidated Copperstate intervened on January 14, 1969; and 13 others of the 23 carriers that have joined in the ATA brief intervened on January 20, 1969—a month *after* the ICC rendered its second order. (A. 3a-6a)

then to ask the court to enjoin the reopening or otherwise impose conditions to protect appellees' interests.[20] The claim of "prejudice" is thus somewhat belated.

Second, appellees have offered no evidence whatsoever to indicate that the Commission was indeed acting as a "litigant" or was otherwise unfair in its handling of the reopened proceedings. They simply assert that this was a "risk". In fact, a substantial volume of additional evidence was submitted to the ICC by protesting carriers following the reopening (A. 210a-363a), and it cannot be assumed that the Commission simply ignored it. In the absence of clear indication to the contrary, the presumption of regularity must control. *Cf.* 2 Davis, *Administrative Law Treatise* § 11.06 (1958).

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[20] Since the ICC had already ordered the reopening when its motion and appellees' opposition were filed in the court below, it would have been a simple matter for appellees to have requested a restraining order against the Commission. Such an order was sought and granted in *Arrow Transp. Co.* v. *United States*, 176 F.Supp 411 (N.D. Ala. 1959), *aff'd* 361 U.S. 353, a case that presented the possibility of "conflict" between the ICC and the district court.

CONCLUSION

For the foregoing reasons and for the reasons set forth in AFL's main brief, the judgment of the district court should be reversed.

Respectfully submitted,

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February 20, 1970

APPENDIX A

Summary of Applications Filed by Certain Appellees with Defense Department Support

Name of Appellee	ICC Docket No.	Date Application Filed	Summary of Authority Sought
Consolidated Freightways Corp. of Delaware	MC-42487 (Sub-No.705)	November 24, 1968	authority to provide direct single-line transportation of explosives to or from military installations in a 41-state area
Garrett Freight Lines, Inc.	MC-263 (Sub-No.185)	September 16, 1968	authority to provide direct single-line transportation of explosives in a 12-state area
IML Freight, Inc.	MC-33641 (Sub-No.80)	December 8, 1968	authority to provide direct single-line transportation of explosives in a 26-state area
Navajo Freight Lines, Inc.	MC-76032 (Sub-No.233)	January 10, 1969	authority to provide direct single-line transportation of general commodities moving on Government Bills of Lading in a 15-state area
Navajo Freight Lines, Inc.	MC-76032 (Sub-No.238)	February 24, 1969	authority to provide direct single-line transportation of explosives in a 13-state area
Navajo Freight Lines, Inc.	MC-76032 (Sub-No.240)	April 7, 1969	authority to provide direct single-line transportation of general commodities moving on Government Bills of Lading in a 28-state area
Pacific Intermountain Express	MC-730 (Sub-No.296)	May 9, 1968	authority to provide direct single-line transportation of explosives in a 25-state area

Name of Appellee	ICC Docket No.	Date Application Filed	Summary of Authority Sought
Riss International Corp.	MC-200 (Sub-No.228)	May 15, 1969	authority to provide direct single-line transportation of general commodities moving on Government Bills of Lading in a 37-state area
J. H. Rose Truck Line, Inc.	MC-13250 (Sub-No.101)	January 13, 1969	authority to provide direct single-line transportation of commodities requiring the use of special equipment, and ammunition and explosives, to and from all military installations in the United States
Tri-State Motor Transit Co.	MC-109397 (Sub-No.164)	November 11, 1968	authority to transport explosives in three additional states to enable provision of direct single-line service
Western Gillette, Inc.	MC-8948 (Sub-No.83)	January 6, 1969	authority to eliminate circuity in transporting explosives
J. J. Willis Trucking Co.	MC-107993 (Sub-No. 15)	February 28, 1969	authority to provide direct single-line transportation of commodities requiring special equipment, ordinance equipment and quartermaster supplies to or from military installations in a 13-state area

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SUPREME COURT OF THE UNITED STATES

Nos. 369 AND 382.—OCTOBER TERM, 1969

American Farm Lines, Appellant, v. Black Ball Freight Service et al. (369)	On Appeals From the United States District Court for the Western District of Washington.
Interstate Commerce Commission, Appellant, v. Black Ball Freight Service et al. (382)	

[April 20, 1970]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Interstate Commerce Commission has statutory power to grant motor carriers temporary operating authority "without hearings or other proceedings" when the authority relates to a "service for which there is an immediate and urgent need" and where there is "no carrier service capable of meeting such need." [1] Interstate Commerce Act § 210a, 52 Stat. 1238, as amended, 49 U. S. C. § 310a. The ICC processes applications for such

[1] Section 219a(a) provides in part:

"To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by common carrier or a contract carrier by motor vehicle, as the case may be. . . ."

authority under rules promulgated in 1965. 49 CFR Pt. 1131.[2] Among other things, those rules require that an applicant accompany his application with supporting statements of shippers which contain information "designed to establish an immediate and urgent need for service which cannot be met by existing carriers." *Id.*, § 1131.2 (c). Each such supporting statement "must contain at least" 11 items of information[3] including the following:

> "(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.
>
> "(9) Names and addresses of existing carriers who have either failed or refused to provide service, and the reasons given for any such failure or refusal."

Appellant American Farm Lines (AFL) filed an application for temporary operating authority.[4] The appli-

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[2] 49 CFR § 1131.4 (b) (2) defines the statutory term "immediate and urgent need" as follows:

"An immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which reasonably cannot be met by existing carrier service. Such a showing may involve a new or relocated plant, different method of distribution, new or unusual commodities, an origin or destination not presently served by carriers, a discontinuance of existing service, a failure of existing carriers to provide service, or comparable situations which require new motor carrier service before an application for permanent authority can be filed and processed."

[3] See 49 CFR § 1131.2 (c).

[4] AFL is a federation of agricultural marketing cooperatives created in 1964 to provide transportation for its members. By virtue of § 203 (b) (5) of the Interstate Commerce Act, 49 Stat. 544, as amended, 49 U. S. C. § 303 (b) (5), AFL may transport freight for its members without obtaining, a certificate of convenience and necessity from the ICC. In 1965 § 203 (b) (5) was construed to exempt from the certification requirement any freight transportation by an agricultural cooperative for shippers other than its own mem-

cation was accompanied by a supporting statement of the Department of Defense (DOD). The ICC Temporary Authorities Board denied the application on the ground that the "applicant has not established that there exists an immediate and urgent need for any of the service proposed." Division I of the ICC (acting as an Appellate Division) reversed the Board and granted AFL temporary authority. Protesting carriers sought review of this action in the United States District Court for the Western District of Washington. A single judge of the District Court temporarily restrained the operation

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bers to the extent that such nonmember transportation is incidental and necessary to its principal transportation activities. See *Northwest Agricultural Cooperative Assn.* v. *ICC*, 350 F. 2d 252. The next year, AFL began transporting freight for DOD. In 1968, AFL's ability to continue serving DOD was restricted by two events. First, certain competing carriers obtained injunctions prohibiting AFL from making two consecutive movements for DOD and from transporting freight for any nonmember except when going to pick up, or returning from delivery of, a member's freight. *Munitions Carriers Conference, Inc.* v. *American Farm Lines*, 415 F. 2d 747. Second, § 203 (b)(5) was amended to restrict the exemption for agricultural cooperatives to those whose transportation for nonmembers does not exceed 15% of their total annual interstate transportation, measured by tonnage. See 82 Stat. 448, 49 U. S. C. § 303 (b)(5) (1964 ed., Supp. IV, 1969). AFL had transported 74,155,685 pounds for DOD between December 1966 and June 1968, and, in an effort to continue providing this service, applied to the ICC in May 1968 for temporary operating authority. The authority sought was to transport general commodities, including Class A and B explosives moving on government bills of lading over irregular routes between points in Kentucky, Indiana, Illinois, Missouri, Arkansas, Louisiana, Texas, Oklahoma, and Kansas on the one hand, and points in Washington, California, Nevada, Utah, and Arizona on the other.

AFL has applied to the ICC for a certificate of permanent authority. It was estimated at oral argument that final action on this application will not be taken by ICC before mid-1971. Meanwhile the ICC may extend the temporary authority. *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line R. Co.*, 353 U. S. 436.

of the ICC order and the ICC thereupon ordered postponement of the operation of its grant. At that time numerous petitions for reconsideration were pending before the Commission and the stay order did not direct the Commission to stay its hand as respects them. The record was indeed not filed with the court until much later. Meanwhile, the Commission granted the petitions and reopened the proceeding to receive a further supporting statement of the Department of Defense. This took the form of the verified statement of Vincent F. Caputo, DOD Director for Transportation and Warehousing Policy, which was submitted as a purported reply to the pending petitions for reconsideration. Based upon this statement, the ICC entered a new order granting the AFL application. A single judge of the District Court restrained the operation of the new order. Thereafter a three-judge District Court conducted a full hearing on the merits.[5] Appellants admitted at that stage that the first ICC order "may not have been based upon evidence to support its conclusions," but argued that there was no infirmity in the new order. The three-judge court set aside both orders. 298 F. Supp. 1006. Both AFL and ICC appealed to this Court and we noted probable jurisdiction.[6] 396 U. S. 884.

I

The first alleged error in the case is the failure of the Interstate Commerce Commission to require strict compliance with its own rules. The rules in question, unlike some of our own, do not involve "jurisdictional" problems but only require certain information to be set forth

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[5] The precise chronology of these events is shown in n. 9, *infra*.

[6] ICC is not appealing from the District Court's decision setting aside the first order.

in statements filed in support of applications of motor carriers for temporary operating authority.

The Caputo statement asserted that part of the tremendous volume of traffic which DOD moved in the territories involved had to be moved "in the most expeditious manner possible," and that, since air transport was prohibitively expensive "except in the most extreme emergencies," there was an "imperative" need for the most expeditious motor carrier service. The need for this expeditious transport did not rest merely on a desire to obtain the most efficient service, but in addition rested on the need to coordinate arrival times of shipments with factory production schedules and with ship-loading or airlift times for overseas shipments. The particular inadequacies in existing service were pointed out, namely, the delays inherent in joint-line service, regular-route service, and the use of single drivers. The statement did not assert that *none* of the existing carriers provided sufficiently expeditious service to meet DOD needs; rather it claimed that the carriers providing satisfactory service in the territories in question were so few in number that the additional services of AFL were required to meet DOD's transportation needs.

Concededly, the Caputo statement did not give the dates of DOD's efforts to secure service from other existing carriers or a complete list of the names and addresses of the carriers who failed or refused to provide service, as required by the terms of subsections (8) and (9), 49 CFR § 1131.2 (c). Such a complete listing of this information, given the volume of traffic involved, would indeed have been a monumental undertaking.

The failure of the Caputo statement to provide these particular specifics did not prejudice the shippers in making precise and informed objections to AFL's application. The briefest perusal of the objecting carriers' replies, which cover some 156 pages in the printed record

of these appeals, belies any such contention. Neither was the statement so devoid of information that it, along with the replies of the protesting carriers, could not support a finding that AFL's service was required to meet DOD's immediate and urgent transportation needs. In our view, the District Court exacted a standard of compliance with procedural rules that was wholly unnecessary to provide an adequate record to review the Commission's decision.

The Commission is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent transportation problems. It is argued that the rules were adopted to confer important procedural benefits upon individuals; in opposition it is said the rules were intended primarily to facilitate the development of relevant information for the Commission's use in deciding applications for temporary authority.

We agree with the Commission that the rules were promulgated for the purpose of providing the "necessary information" for the Commission "to reach an informed and equitable decision" on temporary authority applications. ICC Policy Release of January 23, 1968. The Commission stated that requests for temporary authority would be turned down "if the applications do not *adequately* comply with the . . . rules." *Ibid.* (Emphasis added.) The rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion as *Vitarelli* v. *Seaton*, 359 U. S. 535; nor is this a case in which an agency required by rule to exercise independent discretion has failed to do so. *Accardi* v. *Shaughnessy*, 347 U. S. 260; *Yellin* v. *United States*, 374 U. S. 109. Thus there is no reason to exempt this case from the general principle that "[i]t is always with-

in the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." *NLRB* v. *Monsanto Chemical Co.*, 205 F. 2d 763. And see *NLRB* v. *Grace Co.*, 184 F. 2d 126, 129; *Sun Oil Co.* v. *FPC*, 256 F. 2d 233; *McKenna* v. *Seaton*, 259 F. 2d 780.

We deal here with the grant of temporary authority similar to that granted in *Estes Express Lines* v. *United States*, 292 F. Supp. 842, aff'd, 394 U. S. 718. There the grant of temporary authority was upheld even though there may not have been literal compliance with subsections (8) and (9) of the Commission's rules. That result was in line with § 210a (a) of the Act which was designed to provide the Commission with a swift and procedurally simple ability to respond to urgent transportation needs. That functional approach is served by treating (8) and (9) not as inflexible procedural conditions but as tools to aid the Commission in exercising its discretion to meet "an immediate and urgent need" for services where the existing service is incapable of meeting that need. Unlike some rules the present ones are mere aids to the exercise of the agency's independent discretion.

II

After the Commission issued its first order, petitions for reconsideration were filed and before they were passed upon, some carriers filed suit and a single judge temporarily restrained operation of that first order. It was after that order issued and over a month before the case was argued to the three-judge court that the Commis-

sion granted the petitions for rehearing and reopened the record and received the Caputo verified statement.

The District Court held that the pendency of the review proceedings deprived the Commission of jurisdiction to reopen the administrative record.

Congress has provided as respects some regulatory systems that the agency may modify any finding up until the record is filed with a court. Such is the provision of the Labor Management Relations Act, 29 U. S. C. § 160 (d) and § 160 (e) provides that any subsequent changes in the record will be made only at the direction of the court. A similar provision is included in the Federal Trade Commission Act, 15 U. S. C. § 45 (c) and in the Clayton Act, 15 U. S. C. § 21 (c). And a like provision is included in the review by the courts of appeals of other designated federal agencies. 28 U. S. C. § 2347 (c). But there is no such requirement in the Interstate Commerce Act.[7] It indeed empowers the Commission "at any time to grant rehearings as to any decision, order, or requirement and to revise, change, or modify the same."[8]

The power of the Commission to grant rehearings is not limited or qualified by the terms of 49 U. S. C. § 17 (6) or (7). Thus in § 17 (6) it is said, "Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear." And § 17 (7) provides that if after rehearing or reconsideration the original decision, order, or requirement appears "unjust or unwarranted," the Commission may "reverse, change, or

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[7] It was once proposed that the same requirement be written into the law respecting those orders of the Commission reviewed by the Courts of Appeal as distinguished from the three-judge District Courts. See H. R. Rep. No. 1619, 80th Cong., 2d Sess., 4. But the ICC was deleted from the measure. *Id.*, p. 1. And the Act as approved covered only other designated agencies. 28 U. S. C. § 2342.

[8] See *Baldwin* v. *Scott Milling Co.*, 317 U. S. 478, 484.

modify" the same. These broad powers are plainly adequate to add to the findings or firm them up as the Commission deems desirable, absent any collusion or interference with the District Court.

Unless Congress provides otherwise, "where a motion for rehearing is in fact filed, there is no final action until the rehearing is denied." *Outland* v. *CAB*, 284 F. 2d 224, 227. In multi-party proceedings, such as the present one, some may seek judicial review and others may seek administrative reconsideration. "That both tribunals have jurisdiction does not mean, of course, that they will act at cross purposes." *Wrather-Alvarey Broadcasting Inc.* v. *FCC*, 248 F. 2d 646, 649. The concept "of an indivisible jurisdiction which must be all in one tribunal or all in the other may fit" some statutory schemes, *ibid.*, but it does not fit this one.

This power of the Commission to reconsider a prior decision does not necessarily collide with the judicial power of review. For while the court properly could provide temporary relief against a Commission order, its issuance does not mean that the Commission loses all jurisdiction to complete the administrative process. It does mean that thereafter the Commission is "without power to act inconsistently with the court's jurisdiction." *Inland Steel Co.* v. *United States*, 306 U. S. 153, 160. When the Commission made the additional findings after its first order was stayed by the court, it did not act inconsistently with what the court had done. It did not interfere in the slightest with the court's protective order. What the Commission did came before the court was ready to hear arguments on the merits and before the record was filed with it. Moreover, the Commission in light of the District Court's stay, by express terms, directed AFL not to perform operations under the first order and made the second order effective only on further

order of the Commission.[9] Since by the Act the Commission never lost jurisdiction to pass on petitions for rehearing, and since the stay order did not forbid it from acting on those pending petitions, it was not necessary for the Commission to seek permission of the court to make those rulings.

The Commission reopened the record merely to remedy a deficiency in it before any judicial review of the merits had commenced and fully honored the stay order of the District Court. It therefore acted in full harmony with the court's jurisdiction.

Reversed.

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[9] The District Court's stay was issued October 2, 1968. On October 9, the Commission stayed the effective date of its first order "until further order of the Commission." On November 5, 1968, the Commission reopened the proceeding before it and directed AFL, in light of the District Court's order, "not to perform" any operations under its first order "until further order of the Commission." On November 12, 1968, the Commission advised the District Court of its action. On December 20, 1968, the Commission entered its second order which authorized commencement of service by AFL only on further notice by the ICC. On December 31, 1968, a supplemental complaint was filed in the District Court challenging the Commission's second order. On January 6, 1969, a single judge of the District Court stayed that order. On March 26, 1969, the District Court entered its judgment now being reviewed.

SUPREME COURT OF THE UNITED STATES

Nos. 369 AND 382.—OCTOBER TERM, 1969

American Farm Lines, Appellant, v. Black Ball Freight Service et al. (369)	On Appeals From the United States District Court for the Western District of Washington.
Interstate Commerce Commission, Appellant, v. Black Ball Freight Service et al. (382)	

[April 20, 1970]

MR. JUSTICE BRENNAN, whom MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

I would affirm the judgment of the District Court on the ground that "[e]ven if ICC had jurisdiction to reopen the ICC proceeding and to consider the Caputo verified statement, [the statement] would not meet the requirements of categories (8) and (9) of ICC Rule 49 CFR § 1131.2 (c)." 298 F. Supp., at 1011.

Insofar as ICC regulations emphasize the requirement of information concerning the ability of existing carriers to provide the service sought by a shipper, they implement not only the statutory standard under Interstate Commerce Act § 210a, 49 U. S. C. § 310a, but also the fundamental scheme of our national transportation policy. Ever since the enactment in 1887 of the Interstate Commerce Act, 24 Stat. 379, national policy has reflected the congressional determination that the public interest is served by regulating competition among carriers. See, *e. g.*, Act of September 18, 1940, § 1, 54 Stat. 899, 49 U. S. C. preceding § 301. Regulation of entry into the motor transportation industry is one important feature of the pattern of regulation. *American Trucking Associations, Inc.* v. *United States*, 344 U. S. 298 (1953); *Pan-*

Atlantic Steamship Corp. v. *Atlantic Coast Line R. Co.*, 353 U. S. 436, 440 (1957) (Burton, J., dissenting). The Motor Carrier Part of the Interstate Commerce Act was passed because "the industry was unstable economically, dominated by ease of entry and a fluid rate picture" and "as a result . . . became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety or financial responsibility." Therefore, "Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition." *American Trucking Associations* v. *United States, supra,* at 312–313. To ensure fair and effective regulation of entry, 49 U. S. C. §§ 305–309 require that entry ordinarily be authorized by the ICC only after full adversary proceedings.

Section 210a is a narrow exception to the basic procedural pattern of the Motor Carrier Part since it permits the Commission to grant temporary operating authority after conducting only a minimal adversary proceeding;[1] under 49 CFR § 1131.2–.3 action is taken on the basis of the written application, supporting statements of shippers, and written responses and objections of protestants. But § 210a like the statutory provision considered in *United States* v. *Drum*, 368 U. S. 370, 375 (1962), expressly "bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market." The section is explicit that the ICC may grant temporary operating authority only "to a point or points or within a territory *having no carrier service capable of meeting such need.*" (Emphasis supplied.)

[1] In some "emergency" situations temporary authority may be granted without the notice to protestants otherwise required by ICC rules. See 49 CFR § 1131.2 (d). That provision is not at issue in this case.

This congressional concern to protect existing carriers was again forcefully expressed in the 1968 amendment to § 203 (b)(5) of the Act, 82 Stat. 448–449, 49 U. S. C. § 303 (b)(5) (Supp. IV 1969), which curtails substantially the authority of agricultural cooperatives like AFL to haul nonmembers' freight.

The Senate Committee noted that the decision of the Court of Appeals for the Ninth Circuit in *Northwest Cooperative Association* v. *ICC*, 350 F. 2d 252 (1965), "and the publicity attendant thereto has, as a practical matter, been construed by some cooperatives as an invitation to substantially expand their hauling of non-farm-related traffic for nonfarm members, and by certain groups and organizations as a device to institute unlawful transportation activities." S. Rep. No. 1152, 90th Cong., 2d Sess., p. 6. The Report also states, p. 2:

> "The relative decline of the Nation's common carrier system in recent years is a matter of serious concern. Several traffic studies reveal that common carriers have lost considerable traffic which they formerly handled and, at the same time, have been unable to share proportionately in the additional traffic generated by the Nation's expanding economy.
>
> "This decline is essentially a result of the growth of unregulated private and exempt carriage. But it is also attributable in part to the growth of unauthorized and illegal carriage. Such illegal operators are inimical to the public interest, and if left unchecked, could ultimately undermine the common carrier system."

The ICC recognizes its duty to give effect to this congressional concern for existing carriers in the provision of Rule 1134.4 (b) (2) that "[a]n immediate and urgent need justifying a grant of temporary authority will be determined to exist only where it is established that there is or soon will be an immediate transportation need which

reasonably cannot be met by existing carrier service." This key determination is made upon the basis of the information supplied in response to items (8) and (9). Reasonable disclosure of whatever evidence there may be as to the inadequacy of existing service is thus of crucial importance. Disclosure makes it possible for protestants to frame specific objections addressed to concrete situations, and thereby comply with the provision of Rule 1131.3 (a)(2) that protests "must be specific as to the service which [the] protestant can and will offer . . . ." Disclosure also permits the ICC to come to an informed judgment that properly respects the congressional concern for existing carriers. It follows that details and not generalities are called for. There must be disclosure, by dates and results, of efforts made by the shipper to obtain the needed service from existing carriers, with names and specific reasons given for failure or refusal to provide the service. In a case such as this, ICC action without such information flouts the congressional concern.

ICC Rule 1131.2 (c)(8) and (9) is not a hypertechnical rule, or a mere matter of housekeeping convenience. It goes to the heart of the issue in a temporary authority proceeding. The significance of the rule does not depend on whether, in the Court's words, it "confer[s] important procedural benefits on individuals," but rather on the fact that it is designed to elicit information crucial to determining whether in light of congressional policies a particular factual situation warrants the grant of a temporary authority. Nor is the question in this case, as the Court assumes, whether the ICC erred in failing to require "strict" compliance with the rule. The District Court did not hold the Commission to a standard of strict compliance, and appellees have not argued that strict compliance is required. The issue is whether there was reasonable compliance with a rule which the ICC pur-

ported to apply in this case.[2] The District Court found that the Caputo statement relied on by the ICC in issuing the new order "fails to show any efforts by the Department of Defense to obtain from existing carriers the service AFL seeks to provide, or the identity of any existing carriers who failed or refused to provide the needed service and the reasons given for any such failure or refusal." 298 F. Supp., at 1011. I reach the same conclusion from my examination of the statement.

AFL argues that (8) and (9) require information, not action, and that therefore a response that no effort has been made to obtain the service from other carriers is compliance with both items. However, apart from the doubtful premise that in the circumstances of this case the statute would authorize a grant of temporary operating authority without proof of such effort, the argument is foreclosed by the ICC's express finding in its second order that DOD did in fact attempt to obtain the service elsewhere.[3] See *Securities and Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168–169 (1962).

The ICC makes a different argument. It concedes that the DOD statement does not literally comply with (8) and (9) but argues that the content of the state-

[2] The ICC makes no claim that it did not apply its regulations in this case; the insistence is that DOD's supporting statement satisfied the rules. There is, therefore, no occasion to consider the question mooted in the briefs whether, in light of the principle applied in *Service* v. *Dulles*, 354 U. S. 363 (1957), the ICC could depart from its own rules. See also *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954); *Yellin* v. *United States*, 374 U. S. 109 (1963); *Bridges* v. *Wixon*, 326 U. S. 135, 153 (1945).

[3] The ICC expressly found "that . . . [DOD] has attempted but has been unable to obtain the required and necessary type of service and knows of no carrier in a position to meet its needs."

ment constitutes reasonable compliance. The ICC insists, therefore, that the protesting carriers were not prejudiced by the lack of specific information. Insofar as this argument rests on the extensive explanation in the DOD statement of the advantages of single-line service, ICC's own rule refutes it. 49 CFR § 1131.4 (b)(4) states:

> "Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved."

Thus it was not enough for the statement to assert simply that DOD desires AFL's single-line service because DOD is interested in economy and efficiency; the requirement is that the statement spell out in detail just what DOD's needs are, why these needs cannot be met by existing carriers, and why the authority applied for will enable AFL to meet the needs. Consequently, in this case reasonable compliance with (8) and (9) means at least compliance sufficient to permit an informed application of the standard set forth in § 1131.4 (b)(4). In my view the DOD statement fails this test. It does not indicate specifically what needs are not being satisfied by the joint- or single-line services provided by existing certificated carriers, or how those needs were brought to the attention of the unsatisfactory carriers so as to discover whether they could improve their performance to meet DOD's needs.

The statement begins by noting that DOD ships a "tremendous volume" of freight between the nine-state area and the five-state area in question, and that "[a] part of this traffic requires that it be transported from origin to destination in the most expeditious manner possible." It adds that "[t]his defense need for speed has not been met in many, many instances by the current certified motor carriers due to a number of factors," among which are the facts that the "majority" of carriers offer only joint-line service, that "virtually all" carriers use regular routes which "often" are circuitous, and that "some" carriers use single drivers instead of two-man teams. The statement then gives three examples of inadequate service. The first two examples show that joint-line service is in these instances slower than single-line service, but the single-line service cited is currently being provided by a certificated carrier. Thus these two examples do not show that any of DOD's needs are not currently being met. The third example states that in some instances, where single-line service is available over regular routes, service over irregular routes would be faster. But the statement does not identify these instances; it does not state whether DOD brought the inadequacies to the attention of any carrier; nor does it state that to DOD's knowledge there is no way the certificated carriers could speed up their service between the points in question so as to meet DOD's "reasonable immediate and urgent needs." This entire segment of the Caputo statement fails substantially to carry out the purpose of Rule 1131.2 (c)(8) and (9) because it does not sufficiently identify what DOD regards as particular inadequacies in current service, so as to permit the protestants to make a focused response and the ICC to make a focused assessment of DOD's asserted needs.

The statement goes on to identify numerous points between which no known certificated carrier is authorized to provide single-line service. But for none of these specific routes does it explain why joint-line service is not or could not be made reasonably adequate for DOD's needs.

The statement next refers to particular situations calling for reliable delivery times, and examples of how present service is unreliable. Again, there is a fatal lack of specific information showing that present service is inadequate. The statement explains that it is often necessary to coordinate arrival of inbound shipments with production schedules at factories. As an example, it cites a situation in which only one of the currently certificated carriers has proven able to meet the delivery schedules, even though other carriers were made aware of the need for "timed" deliveries. The one satisfactory carrier cannot transport the entire load. However, the statement does not identify the carriers whose service has been unsatisfactory; it does not say what efforts were made to have them improve their service; and it does not say why they have not conformed to DOD requirements. The same is true of the example of present carriers' failure to make deliveries on time for transshipment outside the United States. It is also claimed that current carriers sometimes lack authority to formulate truckload shipments of diverse commodities, but no examples whatever are cited.

Finally, the statement gives five examples of outstanding service by AFL, and states that in each case DOD experience shows that joint-line carriers could not have met the Department's needs. Again, the unsatisfactory carriers are not identified; their reasons for not improving are not reported; and the "experience" on which DOD bases its assessment of them is not specified.

In sum, the DOD statement fails to supply that concrete evidence of the inability of particular existing car-

riers to provide the needed service which would enable protestants and ICC to make an informed assessment of AFL's application. Of course, DOD was not called upon to supply the specifics of innumerable instances of inadequate or unavailable service or of every effort to obtain improved service. However, the congressional concern expressed in the statutory limitation demanded that ICC be given at least enough specifics concerning inadequate or unavailable service and efforts to obtain better service so that protestants would have an opportunity for informed rebuttal and ICC the basis for an informed determination. It is of course irrelevant that DOD is the Nation's largest shipper and that its freight consists almost entirely of defense needs. ICC has held that "[w]here necessary facts are lacking" the Government is in no better position than any other shipper. *Riss & Co., Inc. Extension—Explosives*, 64 M. C. C. 299, 328 (1955), *National Freight, Inc. Extension—Commodities in Bulk*, 84 M. C. C. 403, 407 (1961).

The Court purports to find in *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (D. C. E. D. Va.), aff'd *per curiam*, 394 U. S. 718 (1968), some support for its glossing over of the inadequacies in the DOD statement. In that case an ICC grant of temporary authority was sustained without a showing that efforts had been made to establish whether any other carrier was able to meet the asserted need for the applicant's services. But the differences between that case and the present one are instructive. There the application was supported by statements of 11 separate shippers, each of whom reported that he had previously obtained the service from the applicant, and thus had never sought it elsewhere and, further, knew of no other carrier with the special characteristics of the applicant. The application covered a single route between the District of Columbia and Richmond, Virginia, and thus it could reasonably

have been found that protestants were not prejudiced by any lack of information in the supporting statements. In striking contrast, the authority sought by AFL covers transportation between all points in a nine-state area and all points in a five-state area. In my view, where an applicant seeks temporary authority as broad as this, reasonable compliance with Rule 1131.2 (c)(8) and (9) requires more information than DOD provided. Accordingly, I would affirm.